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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re ALLSOP.

WHITTAKER *v.* BAMFORD.

[1911 A. 931.]

C. A.

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Oct. 14, 16, 20.

Trustee—Breach of Trust—Relief from Liability—Statute of Limitations—Trustee Act, 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8—*Judicial Trustees Act*, 1896 (59 *&* 60 *Vict. c.* 35), *s.* 3.

A testatrix who died in 1887 bequeathed her residuary personal estate to trustees upon trust to pay the income in equal third parts to her two nephews and her niece during their respective lives and subject thereto to hold the capital and income of the whole in trust for the children of her said nephews and niece who might be living at the time of the failure of the trust thereinbefore contained. Upon the death in 1896 of one of the nephews leaving a widow and children, the trustees, acting upon the erroneous advice of their solicitor as to the effect of the will, paid the income of the deceased nephew's share to his widow for the maintenance of his children. In 1910 it was declared by the Court that the period of distribution was at the death of the survivor of the testatrix's nephews and niece, that there was an implied trust for accumulation of the income until the period of distribution, but that under the Thellusson Act that trust came to an end in 1908, twenty-one years from the death of the testatrix.

In an action by the testatrix's sole next of kin to recover from the trustees the income of the deceased nephew's share as from 1908, and the interest arising from accumulations of income which ought to have been made between 1896 and 1908, the defendants pleaded the Statute of Limitations, relying upon s. 8 of the Trustee Act, 1888, and also claimed relief under the Judicial Trustees Act, 1896 :—

Held by the Court of Appeal, affirming the decision of Warrington J., that the case fell within s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, as being one where no existing statute of limitations applied, and by virtue of

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the proviso at the end of par. (*b*) time did not begin to run against the plaintiff until 1908, when her interest fell into possession, so that the statute was no bar to her claim.

Semble, that the proviso applied to par. (*a*) as well as to par. (*b*) of sub-s. 1.

Held, further, reversing the decision of Warrington J., that the application of s. 3 of the Judicial Trustees Act, 1896, is not confined to cases where the breach of trust arises from some executive or administrative blunder, but may extend to cases where money is paid to a person not entitled according to the true construction of the instrument; that in this case the trustees could not be said to have acted "unreasonably" merely because they had, under legal advice, taken a wrong view of the construction of the will, and, there being no question as to their having acted "honestly," they "ought fairly to be excused for the breach of trust," and were entitled, under s. 3, to be relieved from personal liability for the same.

Observations of Kekewich J. in *Davis* v. *Hutchings* [1907] 1 Ch. 356, 365, disapproved.

APPEAL from a decision of Warrington J.

By her will, dated June 27, 1887, Catherine Allsop appointed Thomas Orme Farmer and two other persons to be executors and trustees thereof, and after giving certain specific legacies and specifically devising certain freehold hereditaments and bequeathing an annuity the testatrix bequeathed all the residue of her personal estate to the said trustees upon trust for sale, conversion, and investment as therein mentioned, and directed her trustees to pay the net income of one equal third part of the said residuary trust moneys to her nephew Robert Whittaker during his life and to pay one other equal third part of the said income to her nephew William Whittaker during his life, and to pay the remaining equal third part of the said income to her niece Elizabeth Ann Whittaker (the plaintiff) during her life; and subject thereto she declared that her trustees should stand possessed of the capital and income of the whole of the said residuary trust moneys in trust for all or any the children or child of her said nephews and niece who might be living at the time of failure or determination of the trust thereinbefore contained, and the issue then living and attaining the age of twenty-one years, or in the case of females marrying, of any children of them her said nephews and niece who might be then dead, such children if more than one taking individually and per capita in equal shares as tenants in common and such issue taking per stirpes as representing their deceased parents in equal shares.

The testatrix died on July 8, 1887.

The trustees other than T. O. Farmer died in 1890 and 1894 respectively.

William Whittaker died on December 19, 1896, leaving a widow, Mrs. Louisa Whittaker, and five daughters, four of whom were infants, him surviving.

T. O. Farmer died on November 25, 1904, having by his will appointed the defendants to be his executrixes.

After the death of William Whittaker, T. O. Farmer continued down to the time of his own death to pay one third of the income to the widow of William Whittaker for the maintenance of the children. In making these payments he acted under the advice of his solicitor, who took the view, erroneous as it turned out, that such payments might properly be made by the trustees. After the death of T. O. Farmer the defendants, his executrixes, continued to make similar payments of income to the widow until September, 1905. Doubts having then arisen as to whether, according to the true construction of the will of the testatrix, the one third part of the residuary estate became distributable upon the death of William Whittaker and whether the payment of income to his widow ought to have been made, an originating summons was taken out in February, 1910, by William Whittaker's children for the purpose of determining those questions.

By an order dated May 26, 1910, Parker J. declared that according to the true construction of the will there was only one period for the distribution of the whole of the testatrix's residuary estate, namely, the date of the death of the survivor of Robert Whittaker, William Whittaker, and the present plaintiff, Elizabeth Ann Whittaker; that William Whittaker's one third share did not therefore become distributable at his death; that there was an implied direction to accumulate the income of such third share from the date of the death of William Whittaker until the period of distribution, and that such direction became void by virtue of the Thellusson Act immediately after the expiration of twenty-one years from the death of the testatrix; and by the same order an inquiry was directed as to who were the persons

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entitled according to the Statute of Distributions to that part of the estate of the testatrix as to which she died intestate. In answer to this inquiry it was found that the person so entitled under the Statute of Distributions was Sarah Whittaker, whose personal representative was the present plaintiff.

On June 28, 1911, the plaintiff brought this action against the defendants claiming accounts (1.) of the accumulations of the income of William Whittaker's one third share of the residuary trust moneys which ought to have been made from December 19, 1896, to July 8, 1908; (2.) of the income of such one third share and of the accumulations from July 8, 1908; and an order that the defendants should replace and make good all moneys found due on taking these accounts, and should pay to the plaintiff the income of the said one third share and of the accumulations from July 8, 1908.

The defendants set up three defences:

(1.) That the plaintiff was debarred from bringing the action by laches and acquiescence.

(2.) That the action was barred by the Statutes of Limitations, and in particular by the Trustee Act, 1888, s. 8. (1)

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(1) Sect. 8, sub-s. 1, of the Trustee Act, 1888 (51 & 52 Vict. c. 59), provides: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him; (*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

(3.) That the defendants were entitled to be relieved under the Judicial Trustees Act, 1896 (1), against all liability to the plaintiff in respect of the alleged breach of trust.

With reference to the first ground of defence the defendants alleged that the plaintiff had from time to time been furnished with accounts by the trustees which informed her of the fact that one third of the income was being paid to the widow of William Whittaker; and they also relied on the following letter, dated November 23, 1906, written by the plaintiff to the solicitor of the trustees: "Dear Sir,—I received a letter from Mrs. Whittaker" (the widow of William Whittaker) "in Portland, Oregon, yesterday, in which she asks me to write to you to please send on her interest as soon as you can. She tells me that she has not received any interest since September 29th, 1905, and she is greatly in need of the money. She has two daughters at home who are far from strong, both having undergone serious operations. You will kindly see to it if you please, Sir, will you not? and let her have the interest due to her without any further delay."

At the trial of the action on November 19, 1912, Warrington J. held (1.) that the defence of laches and acquiescence on the part of the plaintiff failed; (2.) that the case fell within the proviso to s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, and that, the interest of the plaintiff having become an interest in possession only on July 8, 1908, consequently her claim was not statute-barred; and (3.) that the defendants were not entitled to be relieved under s. 3 of the Judicial Trustees Act, 1896. That section had never been applied in a case where trustees had wrongly determined for themselves the beneficial rights of the parties and acted on that determination. It had been applied only where the trustees had performed some administrative act which was afterwards found to be a breach of trust. On all these grounds he gave judgment for the plaintiff.

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(1) The Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3, provides: "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, ... but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

The defendants appealed.

Clauson, K.C., and *Theodore Ribton*, for the appellants. There are three defences to this action: (1.) Laches and acquiescence on the part of the plaintiff. (2.) The right of the defendants to relief under the Judicial Trustees Act, 1896—they acted under competent legal advice. Warrington J., on that point, took the view that relief ought to be confined to cases where there has been an error merely of administration, and ought not to be extended to a case where money due to one person has been wrongfully paid over to another. (3.) The defence of the Statute of Limitations, as to which the defendants rely on *How* v. *Earl Winterton*.(1) As to the second of these defences the submission is that the appellants and their testator "acted honestly and reasonably and ought fairly to be excused" under s. 3 of the Act for the breach of trust.

Davis v. *Hutchings* (2) will be cited against the appellants, but that case only decided that trustees who had failed in their duty could not shelter themselves behind the fraud of their solicitor. That case has no application here. It has never been held that the operation of the Judicial Trustees Act must be limited so as not to apply to a case where a trustee has honestly acted under erroneous advice given to him by his solicitor.

If an ordinary business man might reasonably entertain a particular view of the instrument creating a trust, and the action of the trustee would have been justified if that view had been the true one, the trustee in such a case could not be said to have acted unreasonably merely because that particular view of the construction of the instrument turned out to be wrong: *In re Mackay*.(3) In that case Parker J. said: "Even where a trustee has distributed an estate on an erroneous construction of a will he has been relieved under the Act."

The present case is clearly one in which relief ought to be

(1) [1896] 2 Ch. 626.
(2) [1907] 1 Ch. 356.
(3) [1911] 1 Ch. 300, 307.

granted to the appellants: *In re Kay* (1); *In re Grindey* (2); *Perrins* v. *Bellamy.* (3)

All the elements entitling trustees to be relieved under the Act are present in this case. In *National Trustees Company of Australasia* v. *General Finance Company of Australasia* (4) relief was refused, but there the applicants for relief were not gratuitous but paid trustees.

As to the defence of the Statute of Limitations we submit that this case comes under sub-s. 1 (*a*) of s. 8 of the Trustee Act, 1888. It is an action by the next of kin against the trustees claiming damages for the non-accumulation of the income and is barred by the statute except to the extent of six years. The proviso at the end of the section is put off and only applies to sub-s. 1 (*b*). Upon this point we rely upon the view taken by Lindley L.J. and Rigby L.J. in *How* v. *Earl Winterton.* (5)

Cave, K.C., and *Chetwynd Leech*, for the respondent. The doctrine of laches has never been applied to a case where the person against whom it is set up does not know of his rights. There has been no laches or acquiescence here.

As to the Trustee Act, 1888, we submit that no "rights and privileges" are "conferred by any statute of limitations" in a case of this kind. It does not therefore come within sub-s. 1 (*a*) of s. 8, but is clearly within sub-s. 1 (*b*), and by the proviso to that sub-section the statute did not begin to run until the plaintiff's interest became an interest in possession, which was within six years of the date of the action. The appellants therefore have no defence under the Act of 1888.

Before 1888 there was no statute of limitations applicable to an action in respect of a breach of trust. The Limitation Act, 1623 (21 Jac. 1, c. 16), did not apply to suits in equity. Neither did the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). It applied to actions for account, but not to such an action as this. [They also referred to the Real Property Limitation Act, 1833, s. 40; the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8; the Law of Property Amendment

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(1) [1897] 2 Ch. 518.

(2) [1898] 2 Ch. 593.

(3) [1899] 1 Ch. 797.

(4) [1905] A. C. 373.

(5) [1896] 2 Ch. 626.

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Act, 1860 (23 & 24 Vict. c. 38), s. 13; and the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 2.] There are cases in which sub-s. 1 (*a*) might apply, e.g., *Burdick* v. *Garrick.* (1) Other instances are afforded by *Seagram* v. *Tuck* (2) and *In re Lands Allotment Co.* (3) In *Thorne* v. *Heard* (4) sub-s. 1 (*a*) was expressly held by Romer J. to apply. [They also referred to *In re Somerset* (5), *In re Swain* (6), and *In re Fountaine.* (7)]

Sub-s. 1 (*a*) gets rid of s. 25, sub-s. 2, of the Judicature Act, 1873, and sub-s. 1 (*b*) provides a new protection to trustees. This case comes within sub-s. 1 (*b*), to which the proviso applies, and the appellants cannot avail themselves of the defence of the statute as against the plaintiff, whose interest ripened into possession only in 1908.

As to the appellants' right to relief under the Judicial Trustees Act, 1896, we rely on *National Trustees Company of Australasia* v. *General Finance Company of Australasia* (8) and *Davis* v. *Hutchings.* (9)

We submit that trustees are entitled to relief under the Act only where the breach of trust has been a mere matter of administration, and not where the breach consists in a wrongful distribution of the trust fund.

Clauson, K.C., in reply.

Cur. adv. vult.

Oct. 20. COZENS-HARDY M.R. In this case there has been an undoubted breach of trust in respect of which the defendants are liable unless they can take advantage of some statute of limitations, or can satisfy the Court that there is jurisdiction to give relief under the Judicial Trustees Act, 1896, and that the circumstances are such that the Court in its discretion ought to exercise that jurisdiction.

The testatrix by her will, dated June 27, 1887, gave her residuary estate upon trusts which were (stated shortly) to pay one third of the income to each of three persons during his or her life and upon trust for a class of children or issue of the three tenants for life living at the death of the survivor of the three tenants for life. The testatrix died on July 8, 1887. One of the tenants for life died in December, 1896. The duty of the trustees was then to accumulate the income of this one third until July 8, 1908, the period allowed by the Thellusson Act, and from that date to pay the income, including the income of the accumulated fund, to the statutory next of kin. The plaintiff is the legal personal representative of the sole next of kin. The defendants are the representatives of the last surviving executor and trustee of the will, and since his death have acted as trustees of the will. Since the death of the tenant for life and until a recent date the income has not been applied in accordance with law. It has been paid to or for the benefit of the family of the deceased tenant for life.

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(1) (1870) L. R. 5 Ch. 233.
(2) (1881) 18 Ch. D. 296.
(3) [1894] 1 Ch. 616, 631.
(4) [1893] 3 Ch. 530.
(5) [1894] 1 Ch. 231.
(6) [1891] 3 Ch. 233.
(7) [1909] 2 Ch. 382.
(8) [1905] A. C. 373.
(9) [1907] 1 Ch. 356.

In these circumstances several points of law have been raised. The defendants, who are the appellants, claim the benefit of s. 8 of the Trustee Act, 1888, in respect of any breach of trust more than six years before the issue of the writ, but in my opinion this defence fails. Sub-s. 1 of that section deals with two cases, (*a*) where an existing statute would be available but for the fact of the fiduciary relation, and (*b*) where no existing statute of limitations applies. In my opinion the present case falls under (*b*) and not under (*a*). Doubts have been expressed by some judges as to whether any effect can be given to (*a*): see *In re Bowden* (1) and *How* v. *Earl Winterton.* (2) With great respect, I think this view is wrong. *Burdick* v. *Garrick* (3) is a good illustration of the point. An agent may be sued by his principal for an account, and for payment of the balance, and in some circumstances a plea of the Statute of Limitations would have been perfectly good. If, however, the case was rested upon the ground of fiduciary relation, according to the old law the Court of Chancery would not have allowed the Statute of Limitations to be pleaded as a defence. In the language of Lord Hatherley (4), "I do not say that in every case in

(1) (1890) 45 Ch. D. 444, 448, 450.
(2) [1896] 2 Ch. 626.
(3) L. R. 5 Ch. 233.
(4) Ibid. 240.

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which a bill might be filed against an agent the Statute of Limitations would not apply, but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application." In my opinion (*a*) applies to a case like that, and enables an agent to plead the statute notwithstanding his fiduciary relation. Other instances might be furnished, such as actions by a company against a director. I may also refer to *Thorne* v. *Heard* (1), where Romer J. (2) dealt with a case in which he held sub-s. 1 (*a*) to apply.

If the case falls within sub-s. 1 (*b*) it is clear that the statute will not avail, because the proviso at the end says that the statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary is an interest in possession. In the present case the plaintiff's interest was not in possession until 1908, so that the statute is no bar. Although it is not necessary for my decision in the present case, I think it right to add that in my view the proviso in question applies to the whole of sub-s. 1 and not merely to (*b*), the latter part of the sub-section. I agree with Warrington J. on this part of the case.

The next point raised by the appellants turns upon s. 3 of the Judicial Trustees Act, 1896, which is in the following terms: "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same." It is admitted that the trustees acted honestly.

The appellants contend that that section gives the Court jurisdiction to relieve them from personal liability for the breach of trust, and that the circumstances, to which I must afterwards refer, are such that the Court ought in its discretion to exercise the jurisdiction. The respondent contends that the section applies only to a case where the breach of trust arises from some executive or administrative blunder, and not to a case where money is paid to a person not entitled according to the true construction of the will. The point thus raised is of the utmost importance. Approaching the matter apart from authority I can see no ground for narrowing or limiting the application of the wide words of the section. "Any breach of trust" are emphatic words. The statute was obviously designed to protect honest trustees, and it ought not to be construed in a narrow sense. I shrink from holding that, where trustees have divided an estate between A. and B. after taking competent advice that A. and B. are alone entitled, they cannot plead this section in answer to a subsequent claim by C. So to hold would be to render the relief given by the section almost nugatory. There have, however, been several authorities to which it is necessary to refer. Kekewich J. in *Davis* v. *Hutchings* (1) says: "If a trustee has, without any default of his own, employed a defaulting agent, whom he believed to be a competent man, to do certain work, and, whether competent or not, the agent turns out to be fraudulent and gets the trustee into a scrape, the trustee cannot shelter himself behind that. Why ought he to be let off? A trustee who employs an agent must, according to the ordinary rules of law, be responsible for the acts of the agent. I do not believe it was the intention of the Legislature that he should be let off that. This case occurs to me: A question arises on the construction of a will whether, on a gift to nephews and nieces, the nephews and nieces of the wife as well as of the testator are intended to be included. The trustee takes the opinion of eminent counsel, and is advised that the class is restricted to the nephews and nieces of the testator. No doubt he might take the opinion of the Court, and perhaps be held liable for omitting to take it; but does the taking of the opinion of eminent counsel save him from any liability if, in the event, it be determined that the nephews and nieces of the wife, on the proper construction, are included in the gift? I cannot conceive that the Act was intended to apply to a case of that sort."

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(1) [1893] 3 Ch. 530.

(2) [1893] 3 Ch. 534.

(1) [1907] 1 Ch. 365.

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With great respect, I am unable to accept this view. The decision upon the facts of that particular case may have been right, but the general principles thus laid down cannot, I think, be supported. It is somewhat strange that Kekewich J. in support of his view referred to a case in the Privy Council of *National Trustees Company of Australasia* v. *General Finance Company of Australasia* (1), which turned upon a section of a Colonial Act corresponding with the section now under discussion. There a company, whose business it was to act as trustees for reward, divided an estate wrongly upon the advice of their solicitor. It was first held that the advice of the solicitor was not a defence to the action, and the Court then proceeded to consider all the circumstances and in the exercise of their discretion declined to relieve the trustees. In my opinion that case is an authority that the Court has jurisdiction to relieve when payment has been made to a wrong person, although the Court declined to exercise that jurisdiction, otherwise the inquiry into the circumstances would have been irrelevant. In *In re Kay* (2) Romer J. took a wider view and held that executors, who had paid beneficiaries certain sums which an unpaid creditor sought to make them liable for, were entitled to be relieved. It is true that this was not a question of the construction of a written document, but it was in some respects stronger, for the creditor had a claim prior to any of the beneficiaries. Parker J. in *In re Mackay* (3) used language which I respectfully desire to adopt: "If an ordinary business man might reasonably entertain a particular view of the construction of the instrument and the action of the trustee would have been justified if that view had been the true one, that trustee cannot be said to have acted unreasonably merely because this view of the construction of the instrument is wrong. Even where a trustee has distributed an estate on an erroneous construction of a will he has been relieved under the Act." It may be that there is no reported case in which this has been done, but in the opinion of all the members of the Court this may be done in a proper case. Warrington J. held that the Act has no application where a trustee has misconceived his duty and paid money to a person not entitled. With great respect I think he was wrong in this. The jurisdiction is from its very width one which must be exercised with great caution. It certainly is not enough for a trustee to say "I thought A. B. entitled and I paid him accordingly." He cannot be considered to have acted reasonably if he has neglected to obtain skilled advice. In considering what is reasonable, regard must be had to the estate of which he is trustee. In a large estate it may be only reasonable that he should consult counsel of the first rank or apply by originating summons for the direction of the Court, whereas it would not be reasonable to insist upon all this where the estate is small.

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(1) [1905] A. C. 373.
(2) [1897] 2 Ch. 518.
(3) [1911] 1 Ch. 307.

It remains to apply these principles to the present case. In the first place the clause of the will in question is obscure. It had to be construed by Parker J., and I quite understand that a different, though a wrong, view might be taken of its effect. It seems so natural that the children of the tenant for life should on his death be entitled to the benefit of his share. In the next place the total estate is small, between 4000*l.* and 5000*l.*, and the one third in question was only about 1400*l.* In the third place on the death of the tenant for life the then surviving trustee consulted his solicitor, Mr. Bamford, who gave evidence which was accepted by Warrington J. He advised that the children of the tenant for life had a vested interest and that he might pay the income to the mother at least while they were infants. I should say that the family were resident in Oregon. The correspondence between the solicitor and the widow in January and February, 1897, leaves no doubt as to what took place. The eldest child was of age and the youngest was fourteen. Payment was regularly made to the mother, who was furnished with periodical accounts. This was known to the present plaintiff, who in 1906 wrote to Mr. Bamford and urged him to let the widow have the interest without further delay, as some of the children needed it. There is no reason to doubt that the money thus paid to the widow was applied for the benefit of the family. The defendants continued this practice without taking further advice. In these circumstances, having regard to the perfect honesty of the transaction, I think we are

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justified in exercising the jurisdiction conferred by the section and relieving the defendants from the breach of trust committed by their testator and to a small extent by themselves. Warrington J., holding that he had no jurisdiction to relieve, did not consider whether the circumstances justified relief. Had he applied his mind to the latter question and declined to give relief, I am not sure that I should have thought it right to interfere with his discretion, although it is properly matter of appeal. The case is difficult, but upon the whole I think we ought to relieve the trustees. It is admitted that there must be judgment for accounts, the precise form of which seems accurately worked out in the notice of appeal. The appellants must have the costs of the appeal, but having regard to the conduct of the trustees in declining to account, and to the correspondence which passed, I think there should be no costs in the Court below.

HAMILTON L.J. I agree that the appellants succeed and are entitled to have the decree below varied. It is not quite clear whether Warrington J. based his decision, so far as the Judicial Trustees Act, 1896, s. 3, is concerned, upon the view that such a case as this is not within the language of the section at all, or upon the view that the current of decisions has now settled a rule not to exercise the statutory discretion upon it. Either would in my opinion be erroneous. The section is expressed in terms which are comprehensive and unrestricted. Its object is remedial and the form of the remedy is a discretionary judicial power of relieving against personal liability for "any breach of trust" provided that the trustee "has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach." I think that there was jurisdiction to relieve in the present case, as all these conditions were fulfilled. I concur in the observations of the other members of the Court with regard to the judgment of Kekewich J. in *Davis* v. *Hutchings*. (1) In my opinion no substantial distinction in principle can be shewn between *In re Kay* (2) and this case. If

(1) [1907] 1 Ch. 365.

(2) [1897] 2 Ch. 518.

the Court can relieve against a breach which consists in paying A.'s legacy with money which is really due to B., C., and D. as payment of debts due to them, why in principle may not the Court relieve against the breach which consists in paying to A. for the use of B. and C. money which ought to have been accumulated for the benefit of B., C., and D. in certain events? No reason can be shewn why breaches of trust, due to an erroneous construction of the instrument creating the trust, should be placed judicially beyond the pale of relief. Parker J. in *In re Mackay* (1) states that in such cases relief has been granted and he clearly saw no reason to disapprove the application of relief to such cases. Since Warrington J. has exercised no discretion in the matter, it is for us to do so now. I need hardly say that had he exercised his discretion I should have been slow to interfere with it. Taking all the circumstances of the case into account, the modest size of the fund, the obscurity of the language of the will, the position of the payers (and I see no useful distinction between that of the defendants and that of the original trustee), the advice on which the payments were made, and the person and purposes to and for which they were made, I think the case is one in which the payments were made reasonably, and as the honesty of them has not been questioned I think that the breaches of trust ought fairly to be excused and the relief should be granted.

This would be sufficient to dispose of the appeal, for Mr. Clauson admits that to a limited extent his clients must account. Since, however, the contention based on the Trustee Act, 1888, s. 8, sub-s. 1, has been fully argued, I ought not to pass it over. As at present advised I am far from being satisfied that the appellants can succeed on this part of their case. The proviso is an answer if the case is rested on paragraph (*b*). Grammatically and logically it is equally a proviso upon paragraph (*a*), though as printed in the *Law Reports* edition of the Statutes (2) it is by typographical arrangement and by punctuation restricted to (*b*). To bring their case within (*a*) the appellants must disregard or minimize the distinction drawn in the language of the two paragraphs between limitations derived from any "existing statute" and limitations first prescribed by the statute in question. Mr. Clauson has not satisfied me that his contention can be reconciled with the division of this part of the section into two paragraphs, nor has he established to my mind in spite of the observations in *How* v. *Earl Winterton* (1) that, unless such a case as the present is within paragraph (*a*), the paragraph would be reduced to a nullity.

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(1) [1911] 1 Ch. 307.

(2) The *Law Reports* issue of the Statutes is supplied to the Council of Law Reporting by the King's printers and does not pass through any editor's hands.—F. P.

SWINFEN EADY L.J. The true construction of the will of Catherine Allsop, the testatrix, was determined on May 26, 1910, by an order of Parker J. It was thereby declared that there was one period only for the distribution of the whole of the residuary trust moneys of the testatrix, namely, the date of the death of the survivor of Robert Whittaker, William Whittaker, and the plaintiff Elizabeth Ann Whittaker, and that one third part of the said residuary trust moneys did not become distributable on December 19, 1896, the day of the death of the said William Whittaker, but that there was an implied direction to accumulate the income of such third part from the date of the death of William Whittaker until the time for the distribution of the residuary trust moneys arrived, and that such direction became void by virtue of the Thellusson Act immediately after the expiration of twenty-one years from the death of the testatrix. The period of twenty-one years from the death of the testatrix expired on July 8, 1908. It follows from the decision of Parker J. that the one third of the income paid to the widow of William Whittaker for several years was not a payment authorized by the terms of the trust. The amount of this income should have been invested and accumulated until the expiration of the twenty-one years.

This action was commenced on June 28, 1911, by the administratrix of Sarah Whittaker, who was the person entitled, according to the Statute of Distributions, to the part of the personal estate of the testatrix in respect of which she died intestate. The plaintiff also happens to be one of the two surviving tenants for life under the will.

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(1) [1896] 2 Ch. 626.

The plaintiff's claim, which has succeeded before Warrington J., is to compel the defendants, who are the legal personal representatives of the last surviving trustee, to recoup to the trust estate and replace the one third of the income improperly paid to Mrs. Whittaker since her husband's death, with interest thereon, so that as from July 8, 1908, being the expiration of the twenty-one years, that accumulated fund may be available to produce interest for the benefit of the statutory next of kin, until the death of the last of the tenants for life. The defence to the claim is first that it is barred under the provisions of s. 8 of the Trustee Act, 1888, and, secondly, that in any case the trustees in paying the income to the widow acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter. These defences failed before Warrington J. and have been raised again before us by way of appeal.

The claim is in respect of a breach of trust to compel the defendants to make good and then retain a fund, so that it may produce income for the plaintiff. This is not within any statute of limitations, and accordingly s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, applies. The interest of the plaintiff in this fund did not become an interest in possession until July 8, 1908, upon the expiration of the term of twenty-one years. As from that date, but not before, the income of William Whittaker's one third, and the income to arise from the accumulations of that income which ought to have been made since his death, became payable to the legal personal representative of Sarah Whittaker. As six years have not elapsed since July 8, 1908, this claim is not barred by s. 8, sub-s. 1 (*b*).

The defendants contended that clause (*a*) was the one applicable to their case, and not clause (*b*), but in my opinion that contention cannot be supported.

Clause (*a*) applies to cases where an existing statute of limitations would have applied if the trustee had not occupied that fiduciary position. It embraces cases where a remedy existed, and the Statute of Limitations could have been pleaded as a

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defence, but for the fiduciary position. *Burdick* v. *Garrick* (1) affords an illustration. It was a bill filed against an agent for an account. It was held by the Court of Appeal that the agent in that case was in a fiduciary position, and therefore the Statute of Limitations had no application, but Lord Hatherley refused to say that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply. Under clause (*a*) a fiduciary agent can now, subject to the exceptions in sub-s. 1, plead the statute to the like extent as if there were not any fiduciary position.

Again in a case of contract whereby trustees agree with A. B. to hold certain property upon trust and to pay to A. B. the income thereof for his life, A. B. could sue for the income on the contract, and the trustees could not by reason of their fiduciary position set up the Statute of Limitations. They can do so now under clause (*a*) subject to the exceptions in sub-s. 1. Contract and trust might co-exist and the trust prevent the plea of the statute. Clause (*a*) alters the rule and allows, in cases coming within it, the statute as a defence.

The only claim of the plaintiff in the present case is a claim under a resulting trust—resulting by operation of law. The trust in the will is a trust to accumulate and, having regard to the Thellusson Act, for the remainder of a period of twenty-one years. The future income, not being effectually disposed of by the will, results to the person entitled under the Statute of Distributions. This is an action " brought to recover money ' within clause (*b*) and is one to which no existing statute of limitations applies. It is based upon the breach of trust in not duly investing and accumulating the fund. In my opinion it is within clause (*b*) and not within clause (*a*), and the six years under clause (*b*) did not begin to run until the expiration of the term of twenty-one years, when the plaintiff's interest in the fund first became an interest in possession. In *How* v. *Earl Winterton* (2) the plaintiff's action was not brought within six years of the time when her annuity vested in possession. In the present case the plaintiff has sued within six years of the end of the twenty-one years term.

(1) L. R. 5 Ch. 233.

(2) [1896] 2 Ch. 626.

For these reasons I am of opinion that the plaintiff's claim is not barred by any statute of limitations nor by the Trustee Act, 1888.

There remains the question whether the defendants ought to be excused, and relieved from liability under the Judicial Trustees Act, 1896.

Upon the death of William Whittaker, Thomas Orme Farmer, who was then sole surviving trustee, consulted the solicitors who had acted in the trust from the commencement as to the destination of the one third of the income and was advised to pay it to the widow; the solicitors wrote to the widow in America the letter of January 25, 1897, and in reply the widow, who had taken out letters of administration to her husband, wrote on February 10, 1897, that the children all agreed to leave her in full possession while she lived of her husband's estate, and that they did not wish the home broken up or anything divided. The eldest child was then twenty-one and the youngest fourteen. The income accordingly was paid by Mr. Farmer to William Whittaker's widow until the death of the former, on November 12, 1904, and after his death the defendants as his legal personal representatives continued to deal with the income for a time in exactly the same manner as their testator had done. The plaintiff was aware of this, and indeed on November 23, 1906, wrote to the solicitors urging that the interest then due should be paid to the widow without further delay as she was greatly in need of the money.

Down to this time it does not appear that any question had been raised or any doubt expressed or felt as to the proper construction of the will. William Whittaker's children, however, then took advice, and suggested that they were entitled to recover immediately the capital of the share of which their father and afterwards their mother had received the income, and the originating summons issued by them asked to have that question determined. The result of the summons was that it was determined that the capital was not then distributable and that the income had been improperly paid to the widow.

Under these circumstances ought the defendants to be relieved?

It was urged by the respondent that no case had arisen in

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which a trustee had been excused when he had paid the wrong person—had paid A.'s money to B.; and Warrington J. stated that no case had yet come before the Court where s. 3 of the Judicial Trustees Act, 1896, had been applied when the trustee had wrongly determined for himself the beneficial rights of the parties and acted on that determination. But how do the authorities stand?

In *In re Kay* (1) Romer J. relieved from liability a trustee who had paid A.'s money to B.; he had paid a legacy, and income of the estate, to the widow, the estate being insolvent.

In *In re Grindey* (2) a question arose whether executors should have called in a promissory note for 166*l.*, the amount of which had been lost. There was a provision in the will as to maintaining the estate in the like mode of investment as at the testator's death. Lindley M.R. thought the question of construction one of considerable difficulty, and the trustees were relieved from liability for the loss of the money. Chitty L.J. said (3): "In my experience, there is no source of trouble from which trustees have become more frequently entangled in breaches of trust than obscure wills; and in dealing with this section we may take into consideration the nature of the will itself, and the difficulty in which it placed the trustees. There is certainly on this will a possible construction which might reasonably be entertained by ordinary business men." Thus, although the question arose on a point of the construction of the will, and one of the executors who had been desirous of calling in the note was indemnified by the other two, who acted upon their own view of what their duty was, the Court relieved the defendants from liability.

In *National Trustees Company of Australasia* v. *General Finance Company of Australasia* (4) trustees, under an erroneous view of the law, had paid the trust fund to the wrong person, and, in considering whether or not they should be relieved from liability, the Court considered all the circumstances of the case, including the fact that they were paid trustees, and that they had made no attempt to recover the fund, or so much as was practicable, for their cestuis que trust. If the Court cannot or ought not in any

(1) [1897] 2 Ch. 518.
(2) [1898] 2 Ch. 593.
(3) [1898] 2 Ch. 601.
(4) [1905] A. C. 373.

case to grant relief where a trustee has wrongfully paid the money of A. to B., it would have been quite unnecessary to consider the matters which I have mentioned. This case is really an authority for the appellants, that the Court has jurisdiction under the Act to grant relief in such cases.

Again in *In re Mackay* (1) Parker J. said that even where a trustee had distributed an estate on an erroneous construction of a will he has been relieved under the Act.

The language of s. 3 is wide, and a narrow construction ought not to be placed on it. It was intended to give power to the Court to relieve an honest trustee in proper cases. The words "is or may be liable" appear to point to doubtful questions of construction. In my opinion the case of a trustee committing a breach of trust by paying the wrong person in consequence of acting upon an erroneous construction is within the section, and the Court has jurisdiction to relieve against the personal liability.

I concur in the view which the Master of the Rolls has expressed with regard to the observations of Kekewich J. in *Davis* v. *Hutchings*. (2) Some of these observations were inconsistent with *Speight* v. *Gaunt* (3), and with what the same learned judge had himself previously said in *In re Weall*. (4) The general principles stated by Kekewich J. and the very narrow and restricted construction which he proposed to put upon the Judicial Trustees Act, 1896, cannot be supported.

The jurisdiction, however, requires great care and caution in its exercise. The procedure by originating summons to determine questions of construction is inexpensive and speedy, and should be resorted to when the proper construction of an instrument is open to any serious doubt; the trustee should not in doubtful cases act upon any view without the opinion of the Court being first obtained. But the amount of the fund is a matter to be taken into consideration in determining whether an originating summons should be issued.

In the present case the third share of the year's income was a small amount; no question was raised by any one that the widow was not entitled to receive the money; the advice of

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(1) [1911] 1 Ch. 300, 307.

(2) [1907] 1 Ch. 365.

(3) (1883) 9 App. Cas. 1.

(4) (1889) 42 Ch. D. 674, 678.

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the lawyer was taken and he did not suggest or even apparently consider that there was any doubt as to the true construction of the will, and he advised the payments to the widow which were made; the present defendants merely followed the same course as their testator. No suggestion appears to have been made that there was any question, or any matter of doubtful construction, upon which the opinion of the Court should be taken.

Under these circumstances, I am of opinion that the case of the present defendants and of their testator is within the Act and that they ought to be relieved from liability for the breach of trust arising from paying income to the widow instead of investing and accumulating.

Solicitors: *J. B. R. Conder, for Bamford, Son & Co., Ashbourne; Taylor, Hoare & Jelf, for Randolph Eddowes, Derby.*

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Nov. 6, 11.

DE LISLE *v.* UNION BANK OF SCOTLAND.

[1912 D. 528.]

Mortgage—Redemption—Mortgage of Land—Transfer of Stock as Collateral Security—Fraudulent Pledge of Stock by Mortgagee to Bank—Sub-mortgage of Land to Bank without Notice of Fraud—Mortgagor's Right to redeem as against Bank.

The plaintiff mortgaged land to his solicitor to secure an advance of 4000*l.*, and by way of collateral security transferred to him a sum of 3000*l.* debenture stock. The solicitor then fraudulently induced the plaintiff to execute a memorandum giving a security on the stock in favour of the defendant bank not merely for the 4000*l.* but for all advances by the bank to the solicitor, and the stock was transferred into the names of trustees for the bank who had no notice of the fraud. The solicitor afterwards sub-mortgaged the land to the bank by way of equitable deposit to secure his general indebtedness to them. The bank then obtained from the solicitor a written memorandum of deposit of which they gave notice to the plaintiff, and afterwards took a legal transfer of the mortgage. The solicitor then became bankrupt, owing the bank a sum far exceeding 4000*l.*

In a redemption action against the bank the plaintiff sought to redeem the mortgage on payment of 1000*l.*, being the amount of the mortgage debt less the value of the collateral security. The bank contended that he could only redeem on payment of the full 4000*l.*:—

Held, affirming the decision of Warrington J., that the bank, being

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ignorant of the solicitor's fraud, were entitled as against the plaintiff to apply the stock towards the general indebtedness of the solicitor; but as regarded the mortgage of the land they were in no better position than their assignor, who could not have resisted the plaintiff's right to redeem on payment of 4000*l*. less the value of the stock.

APPEAL from a decision of Warrington J.

In June, 1908, the plaintiff was desirous of purchasing the freehold of certain property called the New Bridge Wharf at West Ham. For the purpose of effecting that purchase he employed Harold Crick, a solicitor, carrying on business under the firm name of Rose Innes, Son & Crick. The plaintiff desired to raise 4000*l*., a portion of the purchase-money, on mortgage of the property, and it was at first arranged that that sum should be advanced by certain clients of Crick who pointed out that additional security would be required. The plaintiff was willing to give a further security upon a sum of 3000*l*. debenture stock of the Grand Trunk Railway Company of Canada.

On July 7, 1908, the plaintiff had an interview with Crick for the purpose of completing the transaction, and he was then told that the money would be advanced by Crick himself, who would obtain it from the defendant bank on the same security as that on which he was lending it to the plaintiff. The agreement between the plaintiff and Crick was that the 3000*l*. should be strictly a collateral security for the 4000*l*. secured by the mortgage, and that on redeeming the mortgage the plaintiff would be entitled to a reconveyance of the property together with a retransfer of the debenture stock, and that if the debenture stock was realized or dealt with by Crick in such a way that he could not retransfer it, the plaintiff would be entitled on redemption to credit for its value.

On July 7, 1908, the plaintiff executed three documents—first, a mortgage of the wharf in common form in favour of Crick to secure 4000*l*. and interest; secondly, a transfer, absolute in form, to Crick of the 3000*l*. debenture stock; thirdly, a document addressed to the defendant bank. This was a printed form with blanks which were filled up by one of the bank clerks. It was dated July 7, 1908, and was in the following terms: "At

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the request of Mr. Harold Crick of Billiter Square Buildings, E.C., I have transferred 3000*l*. Perpetual 4 per cent. Consolidated Debenture Stock of the Grand Trunk Railway Company of Canada into the names of Messrs. Arthur Charles Dalrymple Gairdner and Thomas Henderson as trustees for you to be held as collateral security for your advances to Messrs. Rose Innes, Son & Crick and subject to their arrangements with you."

At the time of the execution of this document Crick falsely represented to the plaintiff that its signature would make no difference to the arrangement between them, namely, that the debenture stock was to be applied merely as a collateral security for the 4000*l*. The 4000*l*. was found by Crick and the purchase of the West Ham property was completed on July 17, 1908, the date of the mortgage being altered from July 7 to July 17.

On July 8, 1908, the transfer of the debenture stock to Crick was lodged by him with the bank together with the memorandum of July 7, a transfer, dated July 8, by Crick himself to the two trustees mentioned in the memorandum, and the stock certificate. Subsequently the bank, who had no notice of the circumstances under which Crick had obtained the plaintiff's signature to the memorandum, were registered in the books of the Grand Trunk Railway as the owners of the stock. On July 21, 1908, the mortgage and the title deeds relating to the property were deposited with the bank by Crick by way of sub-mortgage. That sub-mortgage was subsequently evidenced by a written memorandum of deposit dated September 23, 1911, of which the bank gave notice to the plaintiff on November 28, 1911. In December, 1911, Crick became bankrupt. On January 12, 1912, the bank gave the plaintiff notice to pay off the mortgage. On April 11, 1912, the plaintiff commenced this redemption action against the bank and Crick claiming a declaration that the defendants as sub-mortgagees and mortgagee respectively were only entitled to hold the mortgage of July 17, 1908, as security for 1000*l*. and interest, or in the alternative that the said mortgage and the 3000*l*. debenture stock were a security for the sum of 4000*l*. and interest and no more. The bank alleged that a large sum of money was due from Crick to them far exceeding the 4000*l*., and they claimed to retain the debenture stock in respect of Crick's debt to them, and in addition to hold the mortgage as security for the full sum of 4000*l.* and interest.

At the trial of the action on January 15, 1913, Warrington J. held that the bank as Crick's assignees took subject to all equities which existed between Crick and the plaintiff, and that on July 21, 1908, the date on which the title of the bank first accrued by deposit of the mortgage deed with intent to create a sub-mortgage, Crick could not as a term of redemption have insisted upon the plaintiff paying the whole 4000*l.* unless he had retransferred to the plaintiff the debenture stock; and there was nothing in the case which prevented the application of that equity as between the plaintiff and the bank. He accordingly declared that the bank as sub-mortgagees were only entitled to hold the property comprised in the security for the sum secured by the mortgage after giving credit for the value of the 3000*l.* debenture stock.

The bank appealed against this decision.

Younger, K.C., and *Tomlin, K.C.*, for the appellants. We do not dispute the rule that the assignee of a mortgage or any other chose in action takes subject to all equities existing between the assignor and the original mortgagor, but the submission in this case is that the plaintiff is bound by the definite statement in the mortgage deed that on the day of its execution he received 4000*l.* and was only entitled to redeem on payment of that sum, whereas in truth having given a collateral security, of which no mention was made in the mortgage deed, he was entitled to redeem upon payment of 4000*l.* less the value of that collateral security: *Bickerton* v. *Walker* (1); *Rice* v. *Rice* (2); *Powell* v. *Browne.* (3)

Whatever may be the rights between the plaintiff and Crick, the plaintiff is not entitled to set up as against the bank any arrangement outside the mortgage deed. The bank as assignees are entitled to rely on the statements in the mortgage deed as at its date of execution, but as to what happened afterwards the

(1) (1885) 31 Ch. D. 151.

(2) (1853) 2 Drew. 73.

(3) (1907) 97 L. T. 854.

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mortgagor was under obligation to give notice to the bank or to be bound by the consequences of his failure to do so.

Moreover the bank are entitled to rely upon the plaintiff's representation that the debenture stock was to be held not merely as a collateral security, but as primary security for all advances by the bank to Crick. As to that the plaintiff contends that his signature to the memorandum of July 7, 1908, was in fact fraudulently obtained by Crick as agent of the bank, and that the bank cannot therefore rely upon it; but it is submitted that Crick was not the agent of the bank in that matter.

Cave, K.C., and *Rolt*, for the respondent. The transferee of a mortgage, the mortgagor being no party to the transfer, takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer: *Turner* v. *Smith.* (1) As against an assignee of a mortgage, who has given no notice to the mortgagor, the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way of set-off or mutual credit, as against the mortgagee, he can claim equally against the assignee: *Norrish* v. *Marshall.* (2) The argument against the respondent is that whatever the mortgagor says in the mortgage deed he cannot deny as against the sub-mortgagee. He does not seek to do so. The statement in the mortgage deed was true. The plaintiff did receive the 4000*l.* Crick afterwards went to the bank and fraudulently converted the collateral security to his own use. From that moment the plaintiff was entitled to redeem on payment of the 4000*l.* less the value of the debenture stock. That part of the transaction was subsequent to the mortgage. Crick then deposited the mortgage and the title deeds with the bank, who took subject to the equities existing between the mortgagor and the mortgagee at that date.

It is said, however, that the plaintiff put Crick in possession of a document which enabled him to fraudulently raise money on it. It is admitted that the bank are entitled to rely on the memorandum as security for all their advances to Crick, but that does not affect the plaintiff's right to redeem the mortgage on payment of the 4000*l.* less the value of the collateral security which was improperly dealt with by Crick.

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(1) [1901] 1 Ch. 213.

(2) (1821) 5 Madd. 475, 481.

As to the point that Crick was acting as agent for the bank in procuring the plaintiff's signature to the memorandum we rely upon *Chaplin & Co., Ld.* v. *Brammall* (1) and *Turnbull & Co.* v. *Duval* (2) ; but that is a secondary point.

Younger, K.C., in reply. The statement in the mortgage deed that 4000*l.* was paid by Crick to the plaintiff is not true, or if true it is only true in the sense that the money was procured by virtue of all the transactions which took place. But it is submitted that it is not true, and therefore *Bickerton* v. *Walker* (3) applies.

[SWINFEN EADY L.J. referred to *Norrish* v. *Marshall.* (4)]

The memorandum of July 7 was a representation to the bank which estops the plaintiff from saying that the debenture stock must be treated as a collateral security. *Chaplin & Co., Ld.* v. *Brammall* (1) is no authority for the proposition that Crick was acting as agent for the bank when he made the fraudulent misrepresentation as to the effect of the memorandum.

Cur. adv. vult.

Nov. 11. COZENS-HARDY M.R. The facts as found by Warrington J. may be shortly stated and I do not think there is any great difficulty in applying the law to the facts. The plaintiff had contracted to buy some property at West Ham. In order to complete the purchase he wanted to borrow 4000*l.* on the security of the property itself, but he was told by his solicitor, Mr. Crick, that a mortgagee would require some further security. The plaintiff had 3000*l.* debenture stock, which he was willing to apply for the purpose. At first it was proposed that one of Mr. Crick's clients should advance the money, but Crick said he would himself advance it, and would obtain it from the bank on the same security as that on which he was lending the 4000*l.* to the plaintiff. The agreement between the plaintiff and Crick was that the land should be the principal security, and the debenture stock a collateral security. The transaction was

(1) [1908] 1 K. B. 233.
(2) [1902] A. C. 429.
(3) 31 Ch. D. 151.
(4) 5 Madd. 475, 481.

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carried into effect by a mortgage of the land for 4000*l.* to Crick, and by a transfer of the debenture stock into Crick's name. This was the beginning and end of the transaction between the plaintiff and Crick. The 4000*l.* was provided by Crick for the plaintiff and the purchase was completed. Crick, however, induced the plaintiff to execute a memorandum giving a security on the debenture stock in favour of the bank, not merely as a security for the 4000*l.*, but for all the advances of the bank to Crick, and the debenture stock was transferred into the names of trustees for the bank. The execution of this document was obtained by a representation by Crick that the true nature of the transaction should not be affected by the form of the memorandum. At a subsequent date the mortgage was deposited by Crick with the bank. Now immediately before that deposit what were the rights of the plaintiff against Crick? It seems to me clearly he had a right, on payment of 4000*l.*, to get back his land and also the debenture stock, or if the stock had been so dealt with that Crick could not return it, the plaintiff would have been entitled to get back the land on payment of 4000*l.* less the value of the stock. What then was the position of the bank? So far as the stock is concerned, they being wholly ignorant of Crick's fraud are entitled as against the plaintiff to apply the stock towards the general indebtedness of Crick. But when the plaintiff comes to redeem the mortgage of the land, I think the bank can be in no better position than their assignor. A transaction between the plaintiff and Crick subsequent to the mortgage, but before the sub-mortgage to the bank, raised an equity by which the assignee is bound. This was the view taken by Warrington J.

One point was strenuously argued. It was first said that the plaintiff is estopped from denying that the 4000*l.* was advanced by Crick to the plaintiff. The plaintiff does not deny and never has denied that 4000*l.* was advanced. I do not understand that estoppel can have any place if the statement is true. It only arises when a person is sought to be prevented from asserting the truth. It was then said that in truth 4000*l.* was paid only by means of money received from the bank. I confess my inability to appreciate this point.

I do not think it necessary to discuss the numerous authorities cited, all of which are, as it seems to me, consistent with the conclusion arrived at by Warrington J. The appeal must be dismissed with costs.

Swinfen Eady L.J. In July, 1908, the plaintiff had agreed to purchase certain property at West Ham for 4900*l.* He wished to borrow 4000*l.* to enable him to complete his purchase. His solicitor Harold Crick negotiated an advance for this purpose. It was originally intended to borrow the money from certain clients of Crick. Further security was required, in addition to the West Ham property, which was not of itself considered sufficient security for a loan of 4000*l.* The plaintiff then offered 3000*l.* Grand Trunk debenture stock belonging to him as additional collateral security. He did not wish to sell this stock as he was told that the market would be better later. On July 7 the plaintiff was informed by Crick that the negotiations with the proposed lenders had fallen through, but Crick added "I can do it myself," and to this the plaintiff assented. On the same day Crick asked the plaintiff to sign certain documents. The first was a mortgage in fee for 4000*l.* of the West Ham property. The plaintiff executed this document, although the purchase of the West Ham property had not then been completed. He also executed a transfer to Crick of the 3000*l.* debenture stock. Crick also produced a further document, which was a memorandum addressed to the Union Bank of Scotland, Limited. Crick said that the plaintiff must sign that document, or the mortgage could not go through—that the plaintiff need have no fear as the word "collateral" absolutely secured him, that the money was only a collateral security for the 4000*l.* Crick put his thumb on the word "collateral" and told the plaintiff that when he paid off the 4000*l.* he would obtain a reconveyance of the West Ham wharf and that the collateral security of the 3000*l.* debenture stock would be returned to him. The plaintiff was going to Germany the next day, and he then and there signed the memorandum, having, as he said, complete confidence in Crick. The plaintiff left England for Germany on July 8. He was at sea on the night of the 8th, and remained away in Germany for about six weeks. Crick found the 4000*l.* The purchase of the West Ham property was duly completed and the conveyance and title deeds obtained. The conveyance bears date July 17. The date of the mortgage deed has been altered from the 7th, being the date on which it was executed, to the 17th, being apparently the date on which the purchase was completed. The alteration in the date, and also a consequential alteration in the body of the mortgage deed, have not been initialled, nor were they explained by any evidence. It now appears that Crick executed a transfer to certain nominees of the bank of the 3000*l.* debenture stock, and took it to the bank on July 8, obtaining a present advance of 2300*l.* and lodging the stock as general security for advances to himself according to the tenor of the memorandum. He handed to the bank the certificate of the debenture stock, the transfer by the plaintiff to Crick, the transfer by Crick to the bank's nominees, and the memorandum. The bank had no notice of the circumstances under which Crick had obtained the plaintiff's signature to the memorandum, and are entitled to retain the stock against Crick's large indebtedness to themselves. The mortgage of the West Ham property and the title deeds appear to have remained in Crick's possession until July 21, when Crick took them to the bank, obtained a further advance, and pledged the deeds—to the extent of his interest—to secure his general indebtedness to the bank.

The bank claim that the plaintiff can only redeem the West Ham property on paying 4000*l.* and interest.

The plaintiff claims that the bank on July 21 only became transferees of the interest which Crick had at the date of the transfer—that Crick having realized the collateral security of the debenture stock was bound to give credit to the mortgagor for its value, say 3000*l.*, and that therefore only 1000*l.* was in truth owing to Crick on July 21, and that the bank, as transferees, can only claim against the security the amount really owing to the transferor at the date of the transfer.

The transfer to the bank was at first equitable only, being a sub-mortgage by deposit; subsequently on September 23, 1911, the bank obtained from Crick a written memorandum of deposit, of which they gave notice to the plaintiff on November 28, 1911; and the bank obtained a legal transfer from Crick on December 2, 1911, just before Crick was adjudicated bankrupt.

Before the bank took the deposit of the mortgage, they made no inquiry of the plaintiff as to the amount owing on the security, and gave the plaintiff no notice of their sub-mortgage, before November 28, 1911.

It is well established that a transferee of a mortgage takes subject to the state of the accounts between the mortgagor and mortgagee at the date of the transfer. The bank sought to rely upon *Bickerton* v. *Walker* (1) and contended that the plaintiff had really enabled Crick to deceive the bank by allowing a statement in the mortgage deed that a larger sum had been advanced than was actually the case. This contention is quite unfounded. The whole 4000*l.* was advanced on mortgage to the plaintiff, and the statements in the mortgage deed are true. The deed really takes effect from the day when it was executed by the plaintiff, and the subsequent acquisition of the legal estate feeds the estoppel created by the deed. In truth and in fact the whole 4000*l.* was advanced by Crick to the plaintiff and applied, as was intended, in the completion of the West Ham purchase. But after July 7 Crick converted to his own use the whole of the debenture stock and was bound to account to the plaintiff for its value.

Although 4000*l.* was the amount originally advanced by Crick on the security of the mortgage deed, the bank were not entitled to assume that the whole sum remained owing on July 21; they should have inquired of the mortgagor. Crick's liability to account to the plaintiff for the value of the debenture stock reduced the amount owing by the plaintiff to Crick. The bank as transferees of Crick can only claim what was due from the plaintiff to Crick when the plaintiff first received notice of the transfer: see *Matthews* v. *Wallwyn* (2); *Norrish* v. *Marshall*. (3) The result is that in my judgment the appeal fails.

PHILLIMORE L.J. During the course of the argument I felt much doubt, but the conclusion to which I have come is that the judgment is right and should be affirmed.

(1) 31 Ch. D. 151.
(2) (1798) 4 Ves. 118, 127.
(3) 5 Madd. 475, 481.

On July 8, 1908, one Crick, a solicitor, brought to the defendant bank four documents. Two were signed by the plaintiff, a transfer to Crick of 3000*l.* debenture stock in a certain company, and a document addressed to the defendant bank purporting to pledge this stock as collateral security for advances by the bank to Crick. The third document was a transfer of the stock by Crick to the nominees of the defendant bank, and the fourth was the stock certificate. The defendant bank took these documents as collateral security for Crick's debt.

On July 21 Crick deposited with the defendant bank by way of equitable sub-mortgage a mortgage by the plaintiff of certain lands purporting to secure a loan of 4000*l.* The mortgage was then dated as of July 17, but the date had been, as we can see, altered from the 7th, on which day the deed was executed. The land which the plaintiff purported to mortgage was not conveyed to him till the 17th, but the interest as it accrued would feed the estoppel. Subsequently the defendant bank got the equitable security converted into a legal mortgage.

The plaintiff now seeks to redeem this mortgage on the footing that he has only to pay the balance over and above the value of the debenture stock which the defendant bank has appropriated.

The bank says he can only redeem on payment of the full 4000*l.*

The judge in the Court below has given judgment for the plaintiff.

The plaintiff was deceived into signing the document of pledge as drawn by Crick; he had only meant to give it and the transfer to Crick as collateral security for the loan of 4000*l.* But, as against the defendant bank, who took without notice of the fraud, he cannot rely upon this point; and the defendant bank can appropriate the debenture stock (as it has done) towards satisfaction of Crick's debt. Can the bank also claim 4000*l.* upon the mortgage?

The plaintiff, as between himself and the defendant bank must admit that on July 7 he borrowed 4000*l.* from Crick, and that the mortgage then executed was a security for that sum. He cannot dispute that to which he has put his hand and seal.

If any authority be required for this, *Bickerton* v. *Walker* (1) is an authority. But the defendant bank, while it can rely upon the mortgage as having been in the first instance security for 4000*l.*, must allow any repayment or discharge made at any time afterwards till it protects itself by giving notice to the mortgagor. This is settled by a line of cases, of which *Turner* v. *Smith* (2) and *Norrish* v. *Marshall* (3) are instances. The transferee of a mortgage takes it on the footing that the amount said to have been advanced on the security has been advanced, but with the knowledge that since the creation of the mortgage the debt may have been reduced. He is not bound by the true state of the account between mortgagor and mortgagee at the date of the mortgage, because the statement as to the original loan cannot be falsified; but as to all transactions subsequent to the creation of the security he must take the accounts as they in fact stand unless and until he protects himself by giving notice to the mortgagor. If the plaintiff, on July 7, had purported to borrow 4000*l.* of Crick, but had at the same time given him a transfer of this stock in part discharge, the defendant bank would succeed.

But the plaintiff did not do this. He borrowed 4000*l.*, and the recital in the mortgage is true. At the same time, he gave to Crick, being deceived by Crick, a security which he did not intend as part repayment, and did not intend Crick to use for his own benefit, but which Crick fraudulently converted to his own use. Till Crick took the security to the bank it was uncertain whether he would complete his inchoate fraud. But when he took it and gave it to secure his own debt he converted the stock with which he had been entrusted for another purpose to his own use. Thereupon the plaintiff had his option either to sue for the tort and obtain damages, or to affirm the transaction and treat Crick as liable to him for the proceeds as money had and received to the plaintiff's use.

This being so, unless the defendant bank chose to retransfer the stock to the plaintiff, the debit of the plaintiff as mortgagor to Crick as mortgagee, starting on the footing of an original

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(1) 31 Ch. D. 151.

(2) [1901] 1 Ch. 213.

(3) 5 Madd. 475.

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advance of 4000*l.*, is to be reduced by the value of that stock converted by Crick to his own use at a date subsequent to the creation of the mortgage.

Solicitors: *Coward & Hawksley, Sons & Chance; Colyer & Colyer.*

G. A. S.

NEVILLE J.
1913
Oct. 28, 29.

MILLBOURN *v.* LYONS.

[1912 M. 989.]

Vendor and Purchaser—Contract for Sale of Land—Restrictive Stipulation for Benefit of Adjoining Lands of Vendor—Adjoining Lands sold before Completion of Contract—Whether Restrictive Covenant enforceable.

In December, 1898, the owner in fee of an hotel agreed to sell it to H., the predecessor in title of the plaintiffs. The contract provided that the conveyance should contain a covenant by H., her heirs and assigns, restrictive of the user of the hotel for the benefit of adjoining houses and lands of which the vendor was owner in fee but under a different title. It was a residential neighbourhood, but the contract was no part of a building scheme. The purchase was completed in December, 1899, and the conveyance contained a covenant by H. in the terms of the restrictive stipulation.

Between the date of H.'s contract and the date of completion all the vendor's houses and lands adjoining the hotel were put up for sale by public auction in lots subject to conditions of sale which made no reference to H.'s contract or to the restrictive stipulation. All the lots were sold and conveyed to various purchasers before December, 1899.

In December, 1912, the plaintiffs sold the hotel to the defendant free from restrictions, knowing that he proposed to erect a music hall on part of the hotel premises. The defendant refused to complete on the ground that the hotel was bound by the restrictive stipulation in H.'s contract and conveyance, and that the erection of a music hall might be a breach of the covenant. In an action for specific performance:—

Held, that the material date was not the date of the agreement of December, 1898, but the date of the conveyance of December, 1899; and that, as the vendor at that date had no property to which the benefit of the restrictive covenant could attach, the hotel was not subject to any restrictive stipulation.

WITNESS ACTION.

This was an action for specific performance that raised the question whether a restrictive covenant in the conveyance of a predecessor in title of the plaintiffs was enforceable in these circumstances.

By an agreement in writing dated December 1, 1898, one Jones Vere and his trustee, the owners in fee simple of the Crystal Palace Hotel and gardens, agreed to sell that property to Mrs. Alice Hodgkyns subject to the reservation that the vendors "their heirs and assigns owners and occupiers for the time being of the buildings and property adjoining to or in the neighbourhood of the said hotel and gardens and forming part of the estate of the said" vendors should have the right of drainage therein mentioned. The agreement also provided that the purchase should be completed on December 24, 1898, and that the conveyance should contain "a covenant by the purchaser framed so as to bind her heirs and assigns with the vendors their heirs and assigns owners and occupiers as aforesaid . . . . that neither the said hotel and premises nor any part thereof shall at any time be used for any offensive noisy or dangerous trade business pursuit or occupation or any purpose which shall or may be or grow to be in any way a nuisance damage grievance or annoyance to the vendors their heirs and assigns owners and occupiers as aforesaid or which may tend to depreciate or lessen the value of the adjoining or neighbouring property aforesaid or any part thereof as a residential property."

At the date of this agreement Jones Vere was also the owner in fee simple, but under a different title, of houses and lands adjoining or near to the hotel. It was a residential neighbourhood, but the sale of the hotel to Mrs. Alice Hodgkyns was an isolated transaction and formed no part of a building scheme.

In April, 1899, Jones Vere died, and in July, 1899, the trustees of his will put up for sale by public auction in several lots all the testator's houses and lands adjoining or near to the hotel subject to particulars and conditions of sale which made no reference to the Crystal Palace Hotel nor to the agreement of December 1, 1898, nor to the restrictive stipulations therein mentioned. All the lots were sold at or shortly after the auction, and the sales of all the lots were completed by November, 1899. By reason of delay on the part of Mrs. Alice Hodgkyns the sale to her of the hotel premises under the agreement of December, 1898, was not completed until December 29, 1899, and her conveyance contained a restrictive covenant by her with the trustees of the testator's will to the effect above stated.

On December 9, 1911, the plaintiffs, who had become entitled to the Crystal Palace Hotel and grounds through or under Alice Hodgkyns, entered into a contract with the defendant to sell to him that property. At the time this contract was entered into, which was contained in two documents of even date, the plaintiffs were aware that the object of the defendant in negotiating for the purchase of the property was to erect a music hall on the garden of the hotel, and one of the documents of even date contained the following clause: "It is understood that there are no restrictions attaching to the property which will prevent Mr. Lyons from building on the hotel garden a building suitable for a music hall."

The plaintiffs' abstract of title disclosed the agreement of December 1, 1898, and the conveyance of December 29, 1899, and the defendant in his requisitions objected to the title on the ground, amongst other objections, that the property was bound by the restrictive stipulations, and that the erection of the proposed music hall might be a breach of the agreement and covenant against user entered into by Alice Hodgkyns. The plaintiffs insisted that the property was free from restrictions because, when it was conveyed to Mrs. Alice Hodgkyns by the Jones Vere trustees in December, 1899, these vendors had no other property to which the benefit of the restrictive covenant could attach. The defendants refused to complete, and the plaintiffs brought this action for specific performance, which now came on for trial.

Peterson, K.C., and *J. H. Redman*, for the plaintiffs. The result of the authorities is that a restrictive covenant will bind the assignee of the covenantor only when the person suing on the covenant is the owner of land which has the benefit thereof. There are only two ways in which the benefit of such a covenant can be attached to land—(1.) where the benefit of the covenant is expressly assigned, or (2.) where there is a building scheme, and the rights of all the purchasers are reciprocal and mutual over a defined area: *Renals* v. *Cowlishaw* (1); *Reid* v. *Bickerstaff* (2); *Elliston* v. *Reacher*. (3) Here there was no building scheme, and all the adjoining lands of Jones Vere were sold and conveyed before the conveyance to Mrs. Hodgkyns without any reference to the restrictive stipulations in her agreement of December, 1898, so that at the date of her conveyance there was no land of her vendors to which the benefit of the covenant could be attached. The benefit of such a covenant can only be attached to land by a deed. An agreement to enter into such a covenant will not do because, if the agreement bound the land, the absurd result would follow that if the agreement was not performed the vendor would find that his own land left in his hands was bound by the agreement.

T. T. Methold (*Jenkins, K.C.*, with him), for the defendant. The real question is, what is the effect of the agreement of December, 1898? It creates an equitable right which runs with the land and which can be enforced by the owners of the adjoining lands. All the purchasers under the auction sale in 1899 were assigns and owners of the adjoining lands of the vendors within the meaning of the covenant and were entitled to the benefit of the restrictive stipulation whether they had notice of it or not: *Rogers* v. *Hosegood*. (4) Further, Mrs. Hodgkyns purchased lot 6 at the auction and it was conveyed to her in November, 1899. She bought with notice; why is she not to have the benefit of the restrictive covenant? The only difference between *Rogers* v. *Hosegood* (4) and the present case is this: in that case the restrictive covenant was created by a deed, and here it is created by an agreement, but that makes no real difference. It is an equity which binds the land in the hands of a purchaser who takes with notice of it: *Nottingham Patent Brick and Tile Co.* v. *Butler*. (5) A restrictive covenant is in the nature of an easement, and contracts do affect easements. A mere contract to sell a house may create an implied grant of light over the adjoining land: *Beddington* v. *Atlee*. (6) It is submitted that in the present case the restrictive covenant in the conveyance was annexed in equity to the land by the agreement of December, 1898.

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(1) (1878) 9 Ch. D. 125.

(2) [1909] 2 Ch. 305.

(3) [1908] 2 Ch. 374, 665.

(4) [1900] 2 Ch. 388, 394, 398.

(5) (1885) 15 Q. B. D. 261; on appeal (1886) 16 Q. B. D. 778.

(6) (1887) 35 Ch. D. 317.

Peterson, K.C., in reply. The defendant's contention amounts to this: if the agreement annexes the restrictive covenant, it is annexed for all time, so that if the contract goes off the land remains bound in the hands of the vendor, but it is submitted that a purchaser cannot burden the land before he becomes the legal owner, and that the benefit of a restrictive covenant cannot be annexed to land except by a deed: *Rogers* v. *Hosegood.* (1) There is no case in which such a benefit has been held to be annexed to land except by deed. An easement cannot be created except by deed: *Beddington* v. *Atlee* (2); *Wood* v. *Leadbitter.* (3) Here, at the date of the conveyance to Mrs. Hodgkyns there was no dominant tenement to which the benefit of the restrictive covenant could attach. It is submitted, therefore, that the plaintiffs are not bound by the restrictive covenant.

NEVILLE J. In the year 1898 the Crystal Palace Hotel, which is the subject of the present sale, was agreed to be sold by articles of agreement dated December 1, 1898, and made between parties whom I will call the trustees of the Vere estates on the one hand and the purchaser on the other. That agreement provided that the conveyance should contain a covenant by the purchaser, amongst other things, "that neither the said hotel and premises nor any part thereof shall at any time be used for any offensive noisy or dangerous trade business pursuit or occupation or any purpose which shall or may be or grow to be in any way a nuisance damage grievance or annoyance to the vendors their heirs and assigns owners and occupiers as aforesaid." Whether the clause in the present agreement for sale, "it is understood that there are no restrictions attaching to the property which will prevent Mr. Lyons from building upon the hotel garden a building suitable for a music hall," is satisfied when the proposed site is subject to such a restrictive covenant as the one I have referred to, it is not necessary for me to consider now, but without

(1) [1900] 2 Ch. 388, 406.

(2) 35 Ch. D. 317.

(3) (1845) 13 M. & W. 838.

further argument I should not be prepared to say that a good title is shewn under a representation of that kind where such a restrictive covenant as this exists. The primary question in this case is whether the land, the site of the Palace Hotel, is burdened by such a restrictive covenant at all. That, I think, depends upon the question whether any such burden was created either by the deed of December 29, 1899, when the conveyance was made and the sale completed, or by the agreement of December 1, 1898, which was the agreement for the sale and purchase of the property. It is an agreement that the conveyance should contain a covenant to the effect that I have referred to, and does not purport to be an agreement that the land shall not be used for such a purpose. But I do not place reliance on that because it appears to me that, if such a burden can be created by an agreement, the precise form of words which is used would be treated as immaterial in equity so long as it was clear that the intention was that in the hands of a purchaser the land should be subject to those restrictions.

Taking the agreement first the important question is whether a person, who has agreed to purchase the land but has not become the owner of it, is in a position to annex to it a burden which shall be transmitted to the successive owners of the land. In my opinion he is not. I do not think that such a burden can be annexed to the land except by a person who owns the land. It may be that, if the person who has endeavoured to annex that burden is the owner in equity, then in equity the obligation might be as good as if he were also the legal owner. I think the case of *Rogers* v. *Hosegood* (1) indicates that that may be so. A Court of Equity looks to the question who is the owner of the property in the view of that Court and is not or may not be affected by the existence of an outstanding legal estate; but, in my opinion, the person who has agreed to purchase the property is not in that sense the owner of the property. Much has to be done before such a person can become the owner of the property, and although he has rights and equity recognizes his interest in the property in many ways, I do not think he can be said to be the owner of the property so as to be able to annex the burden to it for the very good reason, as has been pointed out by Mr. Peterson in argument, that non constat the contract would ever be fulfilled. It is difficult to see what the result would be if a person who entered into a contract which he never carries out is enabled to annex a burden to the land in the hands of the owner who never gets the benefit of his contract at all. I think that really decides the only question of any difficulty in the case, because at the date of the conveyance of December 29, 1899, I am satisfied by the evidence that the whole of the adjoining and neighbouring land, which is the subject-matter of the covenant and to which the benefit of the restrictive covenant would have been given, had been parted with by the vendors. Consequently, at the date when the covenant was taken the vendors had no land to which the benefit of the covenant could be attached. It seems to me that really the question is, what is the material date—December 1, 1898, the date of the agreement, or December 29, 1899, the date of the conveyance? For the reasons I have given, in my opinion, the material date is the date of the conveyance and not the date of the agreement. I think therefore that the existence in the agreement of the provision that the conveyance shall contain such a covenant, and the existence in the conveyance of the covenant itself, do not create any difficulty in the title, notwithstanding the declaration in the present agreement for sale with regard to the suitability of the site for the purposes of a music hall. There will be judgment for specific performance of the contract with the usual reference as to the title, and the order will be prefaced with a declaration that the property in question is not subject to any restrictive stipulation.

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(1) [1900] 2 Ch. 388.

Solicitors: *Woodcock Ryland & Parker; Maxwell & Dampney.*

H. L. F.

In re MIDLAND EXPRESS, LIMITED.
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[1912 M. 1340.]

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Oct. 24, 27.

Company—Debentures—Floating Charge—Pari passu—Interest paid to some Holders down to a later Date than to others—Distribution of Assets in Debenture-holder's Action—Claim by other Holders to be paid Difference in Interest in full.

Where debentures are charged by way of floating security to rank pari passu as a first charge on the property of the company "without any preference or priority over one another," and when the security comes to be enforced in a debenture-holder's action it appears that some debenture-holders have been paid interest by the company while a going concern down to a later date than other debenture-holders, the latter (in the absence of some express provision to that effect) are not entitled to have the assets applied in equalizing the amount of interest before any further distribution is made, but the amount found due to each debenture-holder for principal and interest ought to be calculated down to the date of the Master's certificate, and the assets distributed rateably according to the amounts so found due.

Decision of Sargant J. [1913] 1 Ch. 499, affirmed.

Appeal from a decision of Sargant J. (1)

This was the further consideration of a debenture-holder's action in which the usual judgment was given on June 4, 1912.

The company (which was now in liquidation) had issued a series of debentures to the amount of 100,000*l*., of which 70,000*l*. carried interest at the rate of 5 per cent. and 30,000*l*. carried interest at the rate of 4½ per cent., the interest on these 30,000*l*. debentures being payable only out of profits and if and when the profit and loss accounts kept by the company should shew profits available for the payment of such interest.

The debentures were in the following form:—

1. "The Midland Express Limited (hereinafter called the company) will on the first day of November 1921 or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon pay to or other the registered holder for the time being hereof the sum of £ ."

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(1) [1913] 1 Ch. 499.

2. "The company will during the continuance of this security pay to such registered holder interest thereon at the rate of £ per cent. per annum by half-yearly payments on the 1st day of May and the 1st day of November in each year . . . ."

3. "The company hereby charges with such payments its undertaking and all its property present and future including its uncalled capital."

4. "This debenture is issued subject to and with the benefit of the conditions indorsed hereon which are to be deemed part of it."

By the conditions indorsed on the debentures it was provided:

1. "This debenture is one of a series of debentures of the company for securing the principal sums not at any time exceeding £ . Such debentures are all to rank pari passu as a first charge on the property hereby charged without any preference or priority over one another and such charge is to be a floating security but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures. Such debentures are to be for such amounts respectively and are to be issued at such dates as may be arranged between the company and the respective subscribers for the same."

10. "The principal moneys hereby secured shall immediately become payable:—

"(*a*) If the company makes default for a period of one calendar month in the payment of any interest hereby secured.

"(*b*) If an order is made or an effective resolution is passed for the winding up of the company."

11. "At any time after the principal moneys hereby secured become payable the registered holder of this debenture may with the consent in writing of the holder of the majority in value of the outstanding debentures of the same issue appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures and such appointment shall be as effective as if all the holders of debentures of the same issue had concurred in such appointment. And a receiver so appointed shall have power

"(1.) To take possession of the property charged by the debentures

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"(2.) To carry on or concur in carrying on the business of the company

"(3.) To sell or concur in selling any of the property charged by the debentures

"(4.) To make any arrangement or compromise which he or they shall think expedient in the interests of the debenture-holders

And all moneys received by such receiver or receivers shall after providing for the matters specified in the first three paragraphs of clause 8 of section 24 of the Conveyancing and Law of Property Act 1881 be applied in or towards satisfaction pari passu of the debentures And the foregoing provisions in this condition shall take effect as and by way of variation and extension of the provisions of sections 19—24 of the said Act which provisions so varied shall be regarded as incorporated herein."

There was no trust deed.

The 70,000*l.* 5 per cent. debentures were issued as to 34,500*l.* part thereof to various members of the Tangye family, as to 20,000*l.* other part thereof to C. A. Pearson, and the remaining 15,500*l.* to the Daily Express Company, Limited. The 30,000*l.* debentures carrying 4½ per cent. interest out of profits only had been issued to the Birmingham Daily Gazette Company, Limited.

On October 11, 1910, C. A. Pearson, the Daily Express Company, Limited (which had since gone into liquidation), and the Birmingham Daily Gazette Company, Limited, charged the debentures issued to them respectively to secure the payment of a sum exceeding 10,000*l.* to the Darwen Paper Mill Company, Limited.

The property subject to the debentures had now been sold, and the total assets available for distribution between all the debenture-holders amounted to some 12,464*l.* only.

Down to October 31, 1906, the members of the Tangye family had been paid the interest, or the greater part of it, on their debentures by the company while a going concern; but there were large arrears in respect of unpaid interest down to that date on the debentures issued to C. A. Pearson and the Daily Express Company, Limited, part of such interest being in arrear from November 1, 1902. Since October 31, 1906, no interest

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had been paid to any of the debenture-holders. As regards the 30,000*l.* debentures issued to the Birmingham Daily Gazette Company, Limited, no profit had ever been made out of which the interest was to become payable, and no interest had become payable in respect thereof.

By the draft of the proposed minutes of the order on further consideration it was proposed to apply the available assets in the first place to equalize interest down to October 31, 1906, upon the debentures other than those issued to the Birmingham Daily Gazette Company, Limited, and to divide the residue between the members of the Tangye family and the Darwen Paper Mill Company, Limited, in proportion to the capital due on all the debentures. The members of the Tangye family objected to this method of distribution and contended that the amount due to each debenture-holder for principal and interest should be first ascertained and the available assets applied in payment pari passu of the amounts so found due.

Sargant J. held that the debenture-holders who had received less interest than the others were not entitled to have the assets applied in equalizing the amount of interest paid before any further distribution was made.

The Darwen Paper Mill Company, Limited, appealed.

A. Grant, K.C., and *W. M. Cann*, for the appellants. When the Court is administering the common fund which is available for the satisfaction of the debentures equality must be observed. The debenture-holders are in the position of contributory mortgagees having a common security. It is admitted that the company had power to prefer some of the debenture-holders over others in the payment of interest, but in the final distribution that preference must be redressed so as to produce equality. The debentures created a floating charge over all the assets and undertaking of the company. The charge extends to all the assets, including the moneys paid away to the debenture-holders who have been preferred. The question is one which arises between co-mortgagees of a common fund which has been so dealt with as to produce an inequality which, in the final administration of the fund, the Court of Equity will adjust.

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The test is whether the aid of equity has to be invoked. If that be the case, then the doctrine of equality must be applied: *Wilson* v. *Paul* (1); *Mitchelson* v. *Piper*. (2) It is analogous to the administration of a trust in equity. If one cestui que trust has received all that is due to him in preference over the other beneficiaries he is entitled to keep it when the fund is finally administered, but if there is still something due to him, and he has to come into equity to get it, then before he can do so he must bring what he has already received into hotchpot. Here the debentures from the beginning constituted a charge, floating it is true, but ready to come into operation at any moment. This case depends on the nature of the debentures. The moment they came into existence there was a charge which continued to exist till it was disposed of. Secondly, there were two contracts, one between the debenture-holders and the company, and another between the debenture-holders inter se. The nature of a floating security is well settled. It allows the company to carry on its business as if the security had not been created: *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (3); *Illingworth* v. *Houldsworth*. (4) But the charge is in existence the whole time. No doubt it is the ordinary course of business that the company should pay interest on its debentures, but the question is out of what funds ought the interest to be paid. The Court is not administering the whole of the property charged by the debentures, but the residue of it after the company has diminished it by carrying on its business and paying away some of its assets to certain debenture-holders as interest. No doubt everything has been done honestly, but the unpaid debenture-holders must have some remedy in equity. The contract between them and the company is put an end to by the crystallization of the security—*Evans* v. *Rival Granite Quarries, Ld.* (5)—but that does not affect the rights of the debenture-holders inter se. That there is such a contract between them is shewn by conditions 1 and 11 of the debentures. That is why powers are generally given to majorities to bind minorities: Palmer's Company Precedents, 11th ed. pt. iii. p. 163. The pari passu clause places the debenture-holders on a strict equality in all respects: Palmer's Company Precedents, 11th ed. pt. iii. p. 143; *Murray* v. *Scott* (1); *In re Colonial Trusts Corporation.* (2) It is not suggested that we can get money back from debenture-holders who have it actually in their possession, but that if those debenture-holders ask the Court for more they can be compelled to bring that money into hotchpot. The practice to this effect has been considered settled—Annual Practice, 1913, p. 961—and is supported by an unreported decision of Warrington J. on January 29, 1910, in *In re McNab's Receivership*, *Spence* v. *McNab* [1909 M. 3044].

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(1) (1836) 8 Sim. 63.
(2) (1836) 8 Sim. 64.
(3) [1897] A. C. 81.
(4) [1904] A. C. 355, 358.
(5) [1910] 2 K. B. 979.

Gore-Browne, K.C., and *J. E. Harman*, for the respondents, were not called upon to argue.

COZENS-HARDY M.R. This is an appeal from Sargant J. and raises a point which I should have thought must have been settled long ago. It is a case where a company had borrowed money on debentures. There is no trust deed and no trustee. The debentures are in the form of a floating charge in wide terms and the conditions contain a statement that the debentures are "to rank pari passu as a first charge on the property hereby charged without any preference or priority over one another." What happened was this. The company got into difficulties. The charge was crystallized and the property realized. There is not enough to pay all the debenture-holders in full, but some of them received interest which was due to them on their debentures some time before the crash came. The other debenture-holders, possibly through kindly consideration for the company, or for other reasons, did not demand or enforce payment of their interest, and they now contend that in dividing the proceeds of the property realized under the charge the parties ought to be levelled up, in other words that the debenture-holders who have received interest to a later date than themselves ought to receive nothing until the others have received out of the fund now to be divided the equivalent part of their interest, and it is said that that is justified under the terms of the debentures and upon principles of equity.

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(1) (1884) 9 App. Cas. 519.

(2) (1879) 15 Ch. D. 465.

Now what is the position of a debenture-holder? He is not a cestui que trust in any form. He is a mortgagee. He is one of several mortgagees, and by the terms of the contract between the company and each debenture-holder the man who gets the first debenture has not a first charge in priority to the man who gets the second. They all rank equally and any further debenture which is issued is to rank pari passu and equally. It is a case of mortgagor and mortgagee.

Now was there any impropriety in the company paying interest to the debenture-holders? Plainly not. The interest was immediately due and payable and the duty of the company was to pay its interest as it accrued due. The company in the course of its business was plainly entitled to pay interest just as much as to pay its trade debts. This was a proper payment authorized by the debenture itself, for, without attempting to define a floating security, the company was, to use the language of Earl of Halsbury in *Illingworth* v. *Houldsworth* (1), entitled to carry on its business in the ordinary way just as if the debentures had not been issued. During the course of its business the company made this payment of interest to debenture-holders. That was a proper act, and there is no ground whatever for contending to the contrary.

In dividing the proceeds of the realization between the various debenture-holders the critical date is the moment when the charge crystallized. Some may then have received more interest than others, but the actual figures for what was then due on all the debentures must then be taken and the proceeds divided rateably between them. That I think was the substance of the decision of Sargant J., and that is the view which I take. If it is contrary to the view of Warrington J., the case of *In re McNab's Receivership*, *Spence* v. *McNab* (2) must be considered to be overruled. It is not reported and we do not know upon what ground the decision was given. Here there being no trust deed, but simply the relationship of mortgagor and mortgagee in a contributory mortgage, I think the proper thing is to take

(1) [1904] A. C. 355.

(2) Unreported.

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the date when the mortgage was crystallized as the material date.

The appeal must be dismissed.

SWINFEN EADY L.J. I am of the same opinion. Some debenture-holders have received interest and others not, and there has been inequality in the payment of interest. That happened before the floating security ceased to float or, as the term is, "crystallized." Since the crystallization the assets have been or are being realized, and the contention of the appellants is that those debenture-holders who have not received interest on a par with the others must first receive a payment to level them up to what the others have received before there can be any further distribution. That contention is based on the maxim of equity that "equality is equity," and the appellants have relied upon various cases as illustrations of the way in which that maxim is applied in the administration of equity.

In *Mitchelson* v. *Piper* (1) some creditors had been partly paid before the bill was filed for administration, others after it was filed but before decree, and others after decree. The Vice-Chancellor there said (2): "I cannot but think that Mr. Bethell has pointed out the ground on which the other question ought to be decided, namely, that, when a creditor goes into the Master's office to establish his debt, he must show what was the amount due at the testator's death and what he has received since: and, as it is one of the leading maxims of this Court, that equality is equity, the creditors who have been paid in part, ought not to receive any further part either of the legal or of the equitable assets until the other creditors have been paid the same proportion of their debts." It is this principle that the appellants have urged upon us. But in applying this principle one must not lose sight of the fact that in these cases a line is drawn, and the question arises where we are to draw the line here. In administration of the estates of deceased persons the line is drawn at the death. You do not inquire what the testator himself paid in his lifetime. There is a similar principle in administering

(1) 8 Sim. 64.

(2) 8 Sim. 66.

assets in bankruptcy. There you take the position as it was at the date of the commencement of the bankruptcy. Now here the question is when are we to draw the line. Is the line to be drawn when the security crystallizes? Earl Halsbury said in *Illingworth* v. *Houldsworth* (1) the effect of a floating security "is to enable the company to carry on its business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if this deed had not been executed at all." The ordinary course of the business of a company is to pay its debts. But from the time when the security crystallizes there can be no priority amongst the holders of the debentures. As from that date the rule contended for by the appellants should be applied. From that date the debentures are all to rank pari passu without any preference or priority one over the other. You are to ascertain what was due to each debenture-holder on that date and then without any preference or priority divide the fund rateably between them. In my opinion the principle upon which the decision has been given in the Court below is right, and the rule of equity does not apply in the manner suggested, but only from the date when the order was made under which the security crystallized.

PHILLIMORE L.J. I am of the same opinion. While the charge was floating it was the right and duty of the company to carry on its business and to pay its debts, and the company properly paid some of the debenture-holders their arrears of interest. It is agreed here that there is no question of fraudulent preference. The debenture-holders in question are creditors; they properly received their interest, and they were not bound to inquire whether the other creditors were being paid. It may be that they have shewn diligence by bringing an action or pressing for payment. At all events they have been paid certain portions of their claim, with the result that, when the charge crystallized and everybody had agreed to bring in his claim, their claims were for less than those of the others. Why are they not to be paid pro rata on

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(1) [1904] A. C. 355, 358.

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MIDLAND EXPRESS, LIMITED, *In re.*
PEARSON *v.* THE COMPANY.

those claims? I can see no reason to require them to give credit for that which their diligence has acquired.

Appeal dismissed.

Solicitors: *Haslam & Sanders, for Hindle, Son & Cooper, Darwen; E. Flux, Leadbitter & Neighbour, for Slater & Co., Darlaston.*

H. C. R.

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EVE J.
April 8, 9, 18.
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In re MORRISON, JONES & TAYLOR, LIMITED.
COOKES *v.* MORRISON, JONES & TAYLOR, LIMITED.

[1912 M. 2505.]

Fixtures—Hire-purchase Agreement—Equitable Interest—Debentures—Receiver—Possession—Priorities—Right of Vendor of Fixtures to remove.

By an agreement in writing, dated November 11, 1910, G. M. & Co., Limited, agreed to supply and erect upon the works owned by the firm of M., J. & Co. (the predecessors of the defendant company) a complete installation of a patent automatic sprinkler for the protection of the premises from fire, at the price of 237*l.*, payable by annual instalments. In the event of default being made in any annual instalment, or of any breach of the agreement by the purchasers, the whole unpaid balance of principal and interest was immediately to become due. The agreement further provided that the basis of the contract was that the sprinkler installation remained the sole and exclusive property of the contractors until the whole sum of 237*l.* had been paid, and in the event of default the contractors might enter upon the premises and remove the installation. The defendant company was incorporated in 1911 and took over the assets and liabilities of the firm of M., J. & Co., including their interest under the agreement. In December, 1911, the defendant company issued a series of first mortgage debentures containing a charge in the usual form on the undertaking, such charge to be a floating security. On October 18, 1912, a receiver and manager was appointed in an action brought by the debenture-holders to enforce their security. On October 21 the last instalment under the agreement fell due and was not paid. The debenture-holders had no notice of the agreement.

On an application by G. M. & Co., Limited, for liberty to enter upon the defendant company's premises and remove therefrom the sprinkler installation:—

Held by Eve J. and by the Court of Appeal, that the effect of the hire-purchase agreement was to confer upon the applicants an interest in the land to which the sprinkler installation was affixed and to authorize them, in the events which had happened, to enter and remove it; that the interest of the debenture-holders being also equitable the ordinary principles of priorities applied; and that that interest being subsequent in date was therefore postponed to the interest of the applicants.

Rule laid down by Parker J. in *In re Samuel Allen & Sons, Ld.* [1907] 1 Ch. 575, 582, approved and adopted.

ADJOURNED SUMMONS.

By an agreement in writing dated November 11, 1910, and made between George Mills & Co., Limited (thereinafter called "the contractors"), of the one part, and Morrison, Jones & Co. (thereinafter called "the purchasers"), of the other part, the contractors agreed (clause 1) to supply and erect upon the freehold factory of the purchasers, known as the Crown Cabinet Works, Watford, a complete installation of the "Titan" patent automatic sprinkler for the protection of such premises from fire, upon the terms (clause 2) that the purchasers should pay for the same the sum of 237*l.* by annual instalments of 59*l.* 5*s.*, whereof the first was to become due and payable on the completion of the installation. Clause 3 provided that "In the event of default being made in any annual instalment for twenty-one days after the same shall have become payable or of any breach occurring of the agreement by the purchasers hereinafter contained then the whole balance of principal and interest remaining unpaid shall immediately become due and payable and the contractors shall be at liberty to take proceedings for the immediate recovery thereof and also to exercise the other rights hereby conferred upon them." Clause 6 was as follows: "The basis of this contract is that the sprinkler installation and all its appurtenances shall remain and be the sole and exclusive property of the contractors until the entire sum of 237*l.* aforesaid shall have been paid to them by the purchasers and accordingly in the event of any such default as aforesaid the contractors in addition to any other remedy may enter upon the premises of the purchasers and remove such installation and its appurtenances. And the purchasers hereby specifically abandon any claim or right which they may or but for this clause might have before full payment shall have been made to the contractors to regard the installation and its appurtenances as fixtures attached to or forming part of their premises or being or becoming in any way their property. And the purchasers hereby further declare that there is no mortgage or charge existing upon or over their premises under which a mortgagee or other person or company could interfere or claim to interfere with the said installation and appurtenances or the right of entry hereby conferred on the contractors. And the purchasers hereby undertake to give to any intending mortgagee and every other person or company interested full notice of this contract and of the contractors' rights hereunder so that the contractors may be fully and effectually protected against all mortgagees and other persons and companies whatsoever."

On January 11, 1911, the defendant company was incorporated, and acquired and took over the freehold factory, assets, and liabilities of the firm of Morrison, Jones & Co., including, among other interests, the agreement of November 11, 1910.

Default having been made in the payment of the instalments payable under the agreement, a new arrangement was come to under which the defendant company paid down 90*l.* 15*s.* 7*d.* and gave two promissory notes for 50*l.* each maturing on April 21 and October 21, 1912, respectively to secure the balance of the purchase price for the installation.

On December 22, 1911, the defendant company issued a series of first mortgage debentures containing a charge in the usual form on its undertaking, and all its property then present and future, including uncalled capital. By the first of the conditions indorsed on each debenture it was provided that the debentures were to rank pari passu as a first charge on the property thereby charged, and that such charge was to be a floating security, " but so that the company is not to be at liberty to create any mortgage or charge ranking in priority to or pari passu with the said debentures."

There was no trust deed.

On October 14, 1912, the debenture-holders commenced this action to enforce their security, and on October 18 the usual judgment in a debenture-holders' action was pronounced and a receiver and manager was appointed.

On October 21, 1912, the last of the two promissory notes fell due but was not met by the defendant company.

The receiver had entered into possession of the defendant company's property, including the factory to which the sprinkler was attached as a fixture.

On November 19, 1912, George Mills & Co., Limited, took out the present summons asking that notwithstanding the appointment of the receiver they might be at liberty to enter upon the business premises of the defendant company and remove therefrom the sprinkler installation and all its appurtenances erected upon the premises of the defendant company by the applicants in pursuance of the agreement of November 11, 1910.

The summons was adjourned into Court and came on for hearing before Eve J. on April 8 and 9, 1913.

For the purpose of its decision the Court assumed that the debenture-holders took their debentures without notice of the agreement. They had in fact no actual notice.

F. H. Maugham, for the summons. I rely on the case of *In re Samuel Allen & Sons, Ld.* (1) The law as to the right of a mortgagee to seize property of this character will not be extended: *Reynolds* v. *Ashby & Son* (2); *Ellis* v. *Glover & Hobson, Ld.* (3)

J. E. Harman, for the plaintiffs in the action. By virtue of their charge the debenture-holders are entitled to these fixtures. The right of the mortgagor to remove trade fixtures ceases directly possession is taken by the mortgagee by the appointment of a receiver. The mortgagees are here in possession by the receiver, and *Ellis* v. *Glover & Hobson, Ld.* (3) is in my favour. *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (4) is entirely inconsistent with the subsequent cases on the subject. Here the mortgagees took everything comprised in their security.

[He was stopped by the Court.]

F. H. Maugham in reply. It is not correct to say that fixtures belonging to a third party pass upon an equitable mortgage of the land to which those fixtures are affixed. *Hobson* v. *Gorringe* (5) and *Gough* v. *Wood & Co.* (6) do not apply here, as the nature

(1) [1907] 1 Ch. 575.
(2) [1904] A. C. 466.
(3) [1908] 1 K. B. 388.
(4) [1892] 1 Ch. 415.
(5) [1897] 1 Ch. 182.
(6) [1894] 1 Q. B. 713.

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of the debenture-holders' security here is different from that of the mortgagees in those cases. In the case of an equitable charge such as this all that the mortgagee gets is what the mortgagor is able to give him, and he takes subject to all existing equities. The debenture-holders have not really taken possession. The receiver here only takes the property subject to the existing right of the applicants to remove their own property. The debenture-holders' security is only a charge, which is less than a specific equitable mortgage.

[*J. E. Harman* referred to *Meux* v. *Jacobs.*(1)]

Cur. adv. vult.

April 18. EVE J. stated the facts and referring to the summons continued: By this summons the applicants ask that notwithstanding the appointment of the receiver they may be at liberty to enter upon the works and remove therefrom the installation. This is resisted on behalf of the debenture-holders; and the point I have to decide is whether the right to remove reserved to the applicants under their agreement can be successfully asserted against the debenture-holders. I am of opinion that it can.

The agreement according to the decision of Parker J. in *In re Samuel Allen & Sons, Ld.* (2) created an equitable interest in favour of the applicants by which the debenture-holders, as subsequent equitable mortgagees, are bound; and unless the appointment of the receiver operates to prevent the application of the ordinary principles of priorities as between equitable incumbrancers, the equitable interest created by the agreement, being earlier in date, must take precedence.

I take the true answer to the argument founded on such cases as *Hobson* v. *Gorringe* (3), *Reynolds* v. *Ashby & Son* (4), and *Ellis* v. *Glover & Hobson, Ld.* (5), that the appointment of the receiver was equivalent to an entry into possession by the debenture-holders whereby the right of removal was determined, was that formulated by Mr. Maugham in his forcible reply. He contended, and in my opinion rightly, that the nature of the debenture-holders' security is so essentially different from those held by the several mortgagees in the cases referred to that the decisions have really no application to the facts here. Although the property of the company was subjected to a charge in favour of the debenture-holders from the moment the debentures were issued, such a charge was, as the late Lord Macnaghten expressed it, "ambulatory and shifting in its nature" until the happening of some event, or the doing of some act, which caused it to settle and fasten on the subject of the charge within its reach and grasp: *Illingworth* v. *Houldsworth.* (1)

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(1) (1875) L. R. 7 H. L. 481.

(2) [1907] 1 Ch. 575.

(3) [1897] 1 Ch. 182.

(4) [1904] A. C. 466.

(5) [1908] 1 K. B. 388.

The appointment of the receiver was in this case the event or act which brought about this result, and that appointment fixes the moment, and the first moment, at which the subject-matter of the charge can be ascertained and defined. At that moment the company's interest in the subject-matter of this dispute was not an absolute interest, but a qualified one; and in my opinion that which is included in the charge to the debenture-holders is the interest so qualified and nothing more.

Accordingly, I hold that the installation in the hands of the receiver is subject to the same right of removal in favour of the applicants as it was subject to in the hands of the company immediately before the appointment of the receiver, and unless the debenture-holders are prepared to pay the balance of the purchase-moneys and the costs, charges, and expenses of the applicants beyond their costs of this application, I must give to the applicants the leave they ask. The plaintiffs must pay the costs of the applicants, and the costs so paid by them and their own costs will be made costs in the action.

G. M.

From this decision the plaintiffs appealed. The appeal was heard on November 5, 1913.

C. A.

J. E. Harman, for the appellants. The sprinkler installation forms part of the freehold factory comprised in the debenture-holders' security and the respondents have therefore no right to remove it. It is clear law that a mortgage of land carries with it prima facie all fixtures upon it: *Hobson* v. *Gorringe* (1); *Reynolds* v. *Ashby & Son* (2); *Ellis* v. *Glover & Hobson, Ld.* (3) The mere fixing of machinery to the freehold enables the owner to deal with it as part of the freehold, and it is immaterial for this purpose whether he does so by way of legal or equitable mortgage. If fixtures have become affixed to the freehold it does not matter whether they were affixed before or after a mortgage. The cases on this point are conveniently summed up in Smith's Leading Cases, 10th ed. vol. ii. p. 218. It is not correct to say that a mortgagor cannot confer on his mortgagee a better title than he himself has to the mortgaged property. So far as *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (4) supports this view it is wrong: *Gough* v. *Wood & Co.* (5); *Hobson* v. *Gorringe.* (6) No doubt an article affixed to land in mortgage for the purposes of the mortgagor's trade upon the hire-purchase system may be removed by the owner, if not paid for, before the mortgagee takes possession: Ashburner on Mortgages, 2nd ed. p. 231. But when once the mortgagee has taken possession the right of the owner to remove the fixture ceases: *Ellis* v. *Glover & Hobson, Ld.* (7) The mere appointment of a receiver may not in itself be a taking possession, but the fact that the present summons has been taken out is an admission that the receiver is in possession. *In re Samuel Allen & Sons, Ld.* (8) is distinguishable from the present case. There the bank, who were the mortgagees, had never attempted to take possession and were not parties to the agreement under which the fixtures were sold. The argument in the report of the case in the *Law Journal* Reports (9) is quite different from that in the *Law Reports* and explains the ratio decidendi. Here the receiver took possession after his appointment. The whole point here is whether or not the right of the makers of the sprinkler is an interest in land, and it is submitted that it is not, and that, if necessary, the decision of Parker J. in *In re Samuel Allen & Sons, Ld.* (1) that it is should be overruled. A right to enter and remove fixtures has been held not to be an interest in land within the Statute of Frauds: *Lee* v. *Gaskell* (2); *Hallen* v. *Runder* (3); 2 Wms. Saund., 6th ed. p. 259c.

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(1) [1904] A. C. 355, 358.

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(1) [1897] 1 Ch. 182.

(2) [1903] 1 K. B. 87; [1904] A. C. 466.

(3) [1908] 1 K. B. 388.

(4) [1892] 1 Ch. 415, 425.

(5) [1894] 1 Q. B. 713, 724.

(6) [1897] 1 Ch. 182, 189.

(7) [1908] 1 K. B. 398, 399.

(8) [1907] 1 Ch. 575.

(9) 76 L. J. (Ch.) 362, 363.

Nothing turns in the present case on the fact of the charge being by way of a floating security.

It is submitted therefore that the right to remove the fixture was merely a personal right as between the mortgagors and the vendors which determined on the mortgagees taking possession by their receiver. The mortgagees therefore having taken possession have a right to assert that this fixture forms part of their security. [He also referred to Coote on Mortgages, 8th ed. p. 134.]

Maugham, K.C., for the respondents, was not called upon to argue.

COZENS-HARDY M.R. This is an appeal from a decision of Eve J. raising a question, no doubt, of importance. It is a case which has been very fully and ably argued by Mr. Harman on behalf of the appellants, but having listened to the argument and attended to the authorities which have been cited I cannot bring myself to doubt that as far as this Court, at all events, is concerned we ought to hold that the decision of Eve J. is quite right.

Now in this case a hire-purchase agreement was executed which was in the usual terms; I say the usual terms because there is no special peculiarity in this agreement, under which a certain machine, a patent automatic sprinkler, was purchased by the predecessors of Morrison, Jones & Taylor, Limited, at a price payable by annual instalments, with a proviso that if default was made in payment of any one of them the whole of the unpaid balance was to become due and the contractors were to be at liberty to take immediate proceedings for the balance. Then there is clause 6. [His Lordship read the clause and continued:] The original purchasers were the predecessors of the company. It is admitted that the rights are just the same as though there had been no assignment. The company issued debentures in the common form of a floating charge, a purely equitable security. The debenture-holders commenced an action and a receiver and manager was appointed by the order of the Court. Under these circumstances the contractors, that is to say, the persons who supplied the machine to the predecessors of the company, took out a summons asking for leave to take possession of the sprinkler, which is now de facto in the possession of the officer of the Court, and that depends upon the question of whether the title of the contractors is or is not good as against the debenture-holders.

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(1) [1907] 1 Ch. 575.
(2) (1876) 1 Q. B. D. 700.
(3) (1834) 1 C. M. & R. 266.

Now what was the nature of the agreement and what was its effect in point of law? In my opinion it was an agreement by which there was an equitable interest in this part of the freehold property conferred in the events which have happened upon the contractors, a right to go and enter and to take and remove this part of the freehold. I cannot myself doubt that the judgment of Parker J. in *In re Samuel Allen & Sons, Ld.* (1) states the true view of the law and is one which we ought to adopt. Parker J., after expressing the opinion that an equitable mortgagee must be held to take subject to prior equitable agreements, says: "I think that those agreements, if they are in the form which has been used in this case, do create an equitable interest by which a subsequent mortgagee who does not get the legal estate is bound, and that, applying the ordinary principles of priorities as between the interest of the hirer under the hiring agreement and the interest created by the equitable mortgage, the interest created by the hiring agreement takes precedence." That was the definite decision of Parker J. It is, of course, open to us to review that decision, but in my opinion it is quite right, and it is moreover consistent with, I will not say decisions, but certainly important dicta by members of this Court.

In *Gough* v. *Wood & Co.* (2) Lindley L.J., as he then was, obviously had this point present to his mind. The question there was whether a subsequent mortgagee could claim against

(1) [1907] 1 Ch. 575, 582.

(2) [1894] 1 Q. B. 713, 717.

the vendor under a hire-purchase agreement; the mortgagee there had the legal estate and had no notice. He says: "This agreement"—that is the hire-purchase agreement—"was not under seal, and did not therefore amount to a grant of land or of an easement, to which any subsequent mortgage would be subject." Clearly it seems to me, although it may not have been necessary to the decision, Lindley L.J. thought that it was an interest in land, but an interest in land of such a nature that the subsequent mortgagee, or purchaser for value without notice, was not in any way affected by it.

Then in the subsequent case of *Hobson* v. *Gorringe* (1) the same point was really stated by A. L. Smith L.J. in delivering the judgment of the Court. He says: "In our opinion, the engine became a fixture—i.e., part of the soil—subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land." That deals with the legal proposition. Then the learned Lord Justice considers what was the right in equity, and he says: "Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser." But the learned Lord Justice meant there the purchaser having the legal estate without notice of the right.

In my opinion on this short point the judgment of Eve J. was quite right. I think the view taken by Parker J. in *In re Samuel Allen & Sons, Ld.* (2) was in accordance with the law, although the point may not have been precisely decided before, and ought to be followed here. That being so, I think the appeal must be dismissed with costs. I only wish to add that I do not base my judgment in any degree upon the charge being a floating charge. I think the result would have been exactly the same if it had been an ordinary equitable mortgage instead of a floating charge.

SWINFEN EADY L.J. I am of the same opinion.

The order of events in the present case is, first, the contract with the contractors under which the sprinkler was erected. That contract was entered into in November, 1910, and it was a contract to erect upon the works of the company's predecessors a complete installation of a certain patent automatic sprinkler. It was to be paid for by instalments. Then there is a statement in the contract that the purchasers, that is the company's predecessors, "declare that there is no mortgage or charge existing upon or over their premises." It was true at the date of the contract there was no mortgage; and then the contract goes on: "And the purchasers hereby undertake to give to any intending mortgagee and every other person or company interested full notice of this contract and of the contractors' rights hereunder so that the contractors may be fully and effectually protected against all mortgagees and other persons and companies whatsoever." In my opinion this contract is not like a contract for the sale of fixtures intended to be immediately removed. Other considerations may apply to those contracts. It is obvious that this fixture was intended to remain permanently upon the premises in which it was put up. But there was a provision that if it was not duly paid for as the parties at the date contemplated it would be, then there were certain powers of entry. Full power was given, in addition to any other remedy, to enter upon the premises of the purchasers and remove the installation and its appurtenances. So that it is a contract under which fixtures were to be erected with a view to their permanently remaining upon the premises, but in default of payment there was to be a right to enter and remove. The subsequent mortgage was an equitable mortgage, and it may well be that if the company, having made default in giving notice of this interest as they had contracted to do, had gone on and created a legal mortgage without notice, the considerations would have been different. What the company did was this: they entered into this contract and they subsequently borrowed money on an equitable security creating only an equitable mortgage. It is not disputed that equitable mortgagees without notice rank in order of date. In my opinion this contract does effectually create an equitable interest in land, and the result is that the parties entitled must rank according to the dates of their respective securities. Here the contractors come first in point of time, and they are not displaced by the subsequent equitable charge. I therefore agree that the judgment appealed from was right.

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(1) [1897] 1 Ch. 182, 192.

(2) [1907] 1 Ch. 575.

PHILLIMORE L.J. I think that there is some warrant in prior authorities for the conclusion of law at which Parker J. arrived in the case of *In re Samuel Allen & Sons, Ld.* (1), and that there is no reason why it should not be a sound principle of law, though he lays it down in that case apparently for the first time explicitly, that agreements of this nature create an equitable interest in land. If they create an equitable interest in land, then we have in this case two equitable interests in land in conflict, and the one that comes first has the better right, and on that ground I think this appeal fails.

COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitors: *E. W. Reeves, for Sedgwick, Turner, Sworder & Wilson, Watford; Rawle, Johnstone & Co., for John Hall, Bury.*

(1) [1907] 1 Ch. 575.

W. I. C.

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In re KIPPING.
KIPPING *v.* KIPPING.

[1912 K. 264.]

Will—Trust for Sale—Power to postpone—Settlement of Residuary Estate—Share vested in Possession—Right of Beneficiary to insist on immediate Sale.

A testator by will devised and bequeathed all his residuary real and personal estate to trustees upon trust for sale and conversion, with power to the trustees in their absolute and uncontrolled discretion to postpone the sale or conversion. The will contained a provision that until sale or conversion the rents, profits, and income arising from such part of the residuary estate as should for the time being remain unsold or unconverted should be paid or applied to the persons to whom and in the manner in which the dividends, interest, and income arising from the investment of the proceeds of sale of the residuary estate would have been payable or applicable under the trusts declared concerning the same; and the trustees were to stand possessed of the proceeds of sale of the residuary estate in trust for the testator's children who should attain the age of twenty-one years in equal shares as tenants in common.

The testator left seven children who were under twenty-one years of age; one of them on attaining twenty-one claimed that he was entitled to be paid his one-seventh share of the residuary estate or to have his share appropriated to him:—

Held, that he was not so entitled so long as the trustees in the bona fide exercise of their discretion determined to postpone the sale.

In re Horsnaill [1909] 1 Ch. 631, approved.

Decision of Warrington J. affirmed.

Appeal from an order of Warrington J. on an originating summons.

By his will, dated December 11, 1908, a testator, after giving certain pecuniary legacies, devised and bequeathed his real and personal estate not otherwise disposed of to his trustees "upon trust to sell, call in, and convert into money the said real and personal estate, and shall out of the net proceeds of such sale, calling in, and conversion pay my funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by this my will or any codicil thereto, and shall hold the residue of the proceeds of such sale and conversion upon the trusts

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hereinafter declared of the same. Provided always that my said trustee or trustees may in his or their absolute and uncontrolled discretion postpone the sale, calling in, or conversion of my residuary real and personal estate or any part thereof, including leaseholds and other property of a terminable or wasting nature, for such time as he or they shall think fit without being answerable for loss, but my real estate shall for the purpose of transmission be impressed with the quality of personalty from the time of my death." The will further contained a power to the trustees during such postponement to manage the testator's real and leasehold estates, and to make out of capital or income any outlay which they might consider proper; and it further provided that "until sale or conversion the rents, profits, and income arising from such part of my residuary real and personal estate as shall for the time being remain unsold or unconverted shall be paid or applied by my said trustee or trustees upon the trusts, to the persons or person, for the purposes and in manner to whom and for and in which the dividends, interest, and income arising from the investment of the proceeds of sale of my residuary real and personal estate would have been payable or applicable under the trusts hereinafter declared concerning the same. And I declare that my said trustee or trustees shall stand possessed of and interested in the residue of the moneys to arise from the sale, calling in, and conversion of my residuary real and personal estate and the income thereof in trust to pay thereout an annuity of 50*l.* to my said wife during her life so long as she remains my widow . . . . and subject thereto in trust for all and every my children and child" (with certain exceptions not material to this case) "who shall attain the age of twenty-one years and if more than one in equal shares as tenants in common . . . . Provided always and I hereby expressly declare that the capital of my residuary estate shall not be divisible amongst my children in pursuance of the foregoing trusts until my youngest surviving child shall attain the age of twenty-one years."

The testator appointed his widow the guardian of his infant children, and the will contained a direction to the trustees to pay to her 50*l.* a year in respect of each such child for his or her maintenance, education, and advancement, and to accumulate the residue of the income of the expectant share of such minor by investing the same to the intent that such accumulations should be added to the principal share and follow the destination thereof.

The testator died on March 7, 1910, and the will was duly proved.

The testator left seven children entitled to share in the residuary real and personal estate. Two of these, namely, Ralph and Philip Kipping, had at the date of the originating summons attained the age of twenty-one years, and five were under that age, the youngest of whom was born on December 21, 1902. Philip claimed that he was entitled to be paid, subject to proper provision being made for the annuity of 50*l.* to the testator's widow, his one-seventh share of the residuary estate, and the trustees applied to the Court by originating summons to have this question (inter alia) determined.

The testator's estate consisted principally of freehold and leasehold houses near London, in the county of Essex, and the trustees stated that they had sold some of such properties and had endeavoured to sell others, and that out of the proceeds of sale they had paid a portion of the estate duty on the real estate and some of the pecuniary legacies (1); but they were advised that the difficulties of sale at the present time at anything like reasonable prices were very great, and in the exercise of their discretion they desired to postpone the sale of the rest of the property until a favourable opportunity arrived. An affidavit by an estate agent said that the property market was so quiet and prices so low that in his opinion a sale could be effected only at a sacrifice.

Upon the hearing of the summons Warrington J. made an order declaring that, according to the true construction of the testator's will and notwithstanding the direction therein contained that the capital of the testator's residuary real and personal estate should not be divisible among his children until his youngest surviving child attained the age of twenty-one years,

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(1) The summons asked for directions as to the mode of raising money to pay the unpaid instalments of estate duty and the pecuniary legacies, but as to these matters no question was raised on the appeal.

Philip Kipping became entitled on attaining the age of twenty-one years to a vested share; "but" [following the decision of Swinfen Eady J. in *In re Horsnaill* (1)] "is not entitled so long as the trustees in the bona fide exercise of their discretion determine to postpone the realization of the testator's estate to have his share raised or paid to him or appropriated in specie."

The defendant Philip Kipping appealed from the latter part of the order beginning with the words "but is not entitled."

Cave, K.C., and *H. S. Preston*, for the appellant. Each of the beneficiaries, upon attaining the age of twenty-one years, becomes entitled to a vested interest in possession in the residuary estate, and the trustees are bound, if such beneficiary requires them to do so, either to sell the whole of the property and pay him his share of the proceeds of the sale, or to have the property valued and in this latter case either to sell sufficient of the property to pay off the share, or with his consent to appropriate to his share a sufficient part of the estate. The rule is that where one member of a class attains a vested interest the class is closed, and no later born child can become one of the class; and the reason stated for this rule is that "the child who has attained twenty-one cannot be kept waiting for his share": *Gillman* v. *Daunt*. (2) The power to postpone the sale is then at an end, and the trustees ought to sell all the property. At any rate the trustees cannot, as regards the appellant's share, any longer exercise the power to postpone the sale. The trustees have power virtute officii to appropriate part of the property to the share of a beneficiary: *In re Nickels* (3); and if they have that power they ought in fairness to the beneficiary who has attained a vested interest to exercise it, and sell such appropriated part, and if they do not do so, the Court will direct them to do so. Otherwise the beneficiary who has attained a vested interest in possession may be kept out of the enjoyment of his share for an indefinite period. There is in the will an immediate trust for sale subject to a power in the trustees to postpone the sale. The trustees can only postpone the sale until a beneficiary acquires a vested interest. If all the beneficiaries had attained a vested interest the trustees would clearly have been bound to sell. So also if one beneficiary attains a vested interest the trustees must sell at any rate sufficient to pay his share. The power to postpone the conversion of the property is in the nature of a power of management: *Rowlls* v. *Bebb* (1); and the trustees cannot so exercise that power as to vary the rights of the beneficiaries. The Court will not put a beneficiary, who has attained a vested interest in possession, in the position of having to mortgage or assign his share so as to get the benefit of it. Warrington J. in the present case followed the decision of Swinfen Eady J. in *In re Horsnaill* (2) without expressing any opinion of his own. That decision was wrong and ought not to be followed.

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(1) [1909] 1 Ch. 631.

(2) (1856) 3 K. & J. 48.

(3) [1898] 1 Ch. 630.

Clauson, K.C., and *J. Henderson*, for the trustees, and *T. T. Methold*, for the widow and the children who had not attained twenty-one years of age, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion the decision of Warrington J. is right. The will gave the trustees power in their absolute and uncontrolled discretion to postpone the realization of the testator's estate. It is said that now that the appellant has attained a vested interest in possession the trustees have no longer any right to postpone the sale. That is another way of saying that the appellant has a right to insist upon his share of the residuary estate being realized at once, even though such realization may damage the interests of the other beneficiaries. I do not think he has such a right.

BUCKLEY L.J. I am of opinion that the decision of Warrington J. is right. The testator by his will gave his residuary real and personal estate to trustees with an immediate trust for sale. To that trust, however, there was added a power in the trustees in their absolute and uncontrolled discretion to postpone the sale for such time as they should think fit. The will then provided that until sale the rents, profits, and income arising from such part of his residuary estate as should for the time being remain unsold should be paid or applied by the trustees upon the trusts in which and to the persons to whom the dividends, interest, and income arising from the investment of the proceeds of sale of his residuary estate would have been payable or applicable under the trusts declared thereof. The trusts declared of the proceeds of sale were for such of his children, who in fact were seven in number, as should attain the age of twenty-one years. Two of his children had, at the date of the originating summons, attained that age. One of these two contends that he is entitled to have the residuary estate or a sufficient portion thereof sold in order that he may be paid his one-seventh share thereof, notwithstanding that the trustees in the bona fide exercise of their discretion have abstained from selling. In other words, his contention is that the trustees are bound to sell because he has a right to a distributive share of the residuary estate and to be paid that share. He is not, in my opinion, so entitled. The will gives him, not a distributive share of a sum of money, but a distributive share of the income of the property so long as it remains unsold, and a distributive share of the proceeds of sale when the property is sold. There is no gift of the proceeds of sale until the property is sold, and he is not entitled to interfere with the bona fide exercise by the trustees of their discretion and to call upon them to sell. There is no original gift to him under which he is entitled to have the property sold now. The learned judge followed the decision of Swinfen Eady J. in *In re Horsnaill* (1), a case which, in my opinion, was rightly decided. The appeal must therefore be dismissed.

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(1) [1900] 2 Ch. 107, 115, 116.

(2) [1909] 1 Ch. 631.

KENNEDY L.J. I am of the same opinion and have nothing to add.

Solicitors: *Braund & Hill; Carr, Tyler, & Overy; C. E. Pullon.*

W. F. B.

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(1) [1909] 1 Ch. 631.

C. A.
1913
Nov. 10.

EASTWOOD *v.* ASHTON.

[1912 E. 526.]

Vendor and Purchaser—Condition negativing Compensation—Conveyance—Parcels — Plan — Falsa demonstratio — Implied Covenants for Title — Omission to prevent Acquisition of Title under Statute of Limitations—Liability of Vendor—Measure of Damages—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (A).

Description of property as B. H. Farm in the occupation of certain named tenants, with correct measurements added,

Held (reversing the decision of Sargant J. [1913] 2 Ch. 39), on the true construction of the conveyance, to be an accurate description of the land sold and not vitiated by a reference to a plan which included other land.

Appeal from a decision of Sargant J. (1)

This was an action in which the plaintiff claimed damages from the defendant for breach of his implied covenants for right to convey, quiet enjoyment, and further assurance in conveying as beneficial owner a small strip of land, some 100 feet long by 36 feet wide, included in lot 4, consisting of some 84 acres 3 roods 4 perches, sold by auction in 1911. In the conveyance to the plaintiff, dated June 28, 1911, the property was described as "All that farm with the messuage tenement or farmhouse barns stables outhouses closes or parcels of land belonging thereto called Bank Hey Farm situate in the parish of Blackburn in the county of Lancaster containing 84 acres 3 roods 4 perches or thereabouts and in the occupation as to part thereof by Thomas Haydock as yearly tenant thereof and as to the remainder thereof by Charles William Eastman as half-yearly tenant thereof all which said premises are more particularly described in the plan endorsed on these presents and are coloured red in such plan." The whole of the land including the disputed strip was coloured red on the plan, but it appeared that the strip was in fact in the adverse possession of other persons, so that the purchaser could not obtain possession of it.

Sargant J. held that the inclusion of the strip could not be rejected as falsa demonstratio and must prevail, that the strip of land was included in the parcels conveyed, and that the plaintiff was entitled to damages. His Lordship also decided other questions which appear in the report of the case. (1)

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(1) [1913] 2 Ch. 39.

The vendor appealed.

A. Grant, K.C., and *G. B. Rashleigh*, for the appellant.

Romer, K.C., and *T. T. Methold*, for the purchaser.

The only point argued was the question of the true construction of the conveyance of June 28, 1911.

The COURT (Cozens-Hardy M.R., Swinfen Eady, L.J., and Phillimore L.J.) held that on the true construction of the conveyance the strip of land was not included in the parcels. The land conveyed was accurately and completely described as being in the occupation of two tenants, the measurements were correct, and the reference to the plan was merely a falsa demonstratio which did not vitiate the description. Therefore the other questions argued in the Court below did not arise, and the plaintiff was not entitled to damages.

Appeal allowed.

Solicitors: *Witham, Roskell, Munster & Weld; Rawle, Johnstone & Co., for Wilson, Eastwood & Ramsbottom, Blackburn.*

H. C. R.

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(1) [1913] 2 Ch. 39.

Considered. In re Birkett, decd. [1950] 1 Ch. 380

Considered. Re Jeeves. [1949] Ch. 49

SARGANT J.
1913
Oct. 23.

In re HARPER.
PLOWMAN *v.* HARPER.

[1913 . H. 1634.]

Will—Construction—Bequest to Unmarried Daughters of A. and B.—Bequest to B. personally—Division per capita.

Testatrix, after giving certain pecuniary legacies, including a legacy of 500*l.* to Dr. G. in recognition of his kindnesses, gave her residuary estate in trust to pay the income to her sister during her life, and after her death in trust to divide the same into two equal moieties, one moiety to be paid to the testatrix's niece, and "the other moiety to be divided equally between the unmarried daughters of my brother-in-law Dr. H. and Dr. G. equally." At the date of the will the testatrix's sister was seventy-four years of age; Dr. H. had five daughters, of whom three were unmarried, and Dr. G. had one daughter only who was four years of age:—

Held, that, looking to the surrounding circumstances, on the true construction of the will the gift was a gift to Dr. G. personally and not to his unmarried daughter.

Held, also, that the moiety was divisible in equal fourth shares between the three unmarried daughters of Dr. H. and Dr. G.

In re Walbran [1906] 1 Ch. 64, followed on the first point and distinguished on the second point.

Adjourned Summons.

Harriet Harper, by her will dated November 19, 1908, appointed executors and trustees, and after making certain pecuniary legacies, including a legacy of 500*l.* to Dr. Alexander Smeaton Grant, "in recognition of friendship and his many kindnesses," gave the residue of her real and personal estate to her trustees upon trust for sale and conversion and to stand possessed of the trust premises upon trust to pay the income to her sister, Margaret Tait, for her life, and after her death to pay and divide the same into equal moieties, "one moiety to be paid to my niece, Eugenie Mackinnon, and the other moiety to be divided equally between the unmarried daughters of my brother-in-law, Dr. J. Harper, and Dr. Alexander Smeaton Grant equally."

The testatrix died on November 20, 1908. At the date of her will her sister Margaret Tait was seventy-four years of age; Dr. J. Harper had five daughters, of whom three were then and still unmarried, and Dr. Alexander Smeaton Grant had one daughter only, Edith Mary Grant, who was an infant of four years of age.

Margaret Tait died in 1913; and this was an originating summons taken out by the trustees for the determination of the questions (1.) whether the gift was to Dr. Alexander Smeaton Grant personally or to Edith Mary Grant as his unmarried daughter; and (2.) whether the moiety was divisible equally between the unmarried daughters of Dr. J. Harper and Dr. Alexander Smeaton Grant or Edith Mary Grant (as the case might be), or whether the unmarried daughters of Dr. J. Harper took one half share of the moiety and Dr. Alexander Smeaton Grant or Edith Mary Grant (as the case might be) the other half share thereof.

Manning, for the trustees.

A. C. Nesbitt, for Dr. Grant. The gift is to Dr. Grant and not to his unmarried daughter. Looking at the circumstances existing at the date of the testatrix's will there was no married daughter of Dr. Grant and it was in the highest degree improbable there would be any married daughter of his at the date of distribution. In his case therefore the testatrix could not have intended to contrast married and unmarried daughters. On the general rule of construction *In re Walbran* (1) is directly in point. See too *Peacock* v. *Stockford* (2), per Turner L.J., and *Hawes* v. *Hawes*. (3)

R. M. Pattisson, for Edith Mary Grant. The gift is to the unmarried daughter of Dr. Grant and not to Dr. Grant himself. The authorities cited do not govern the present case. The relevant remarks of Turner L.J. in *Peacock* v. *Stockford* (2) are obiter merely. The language in *Hawes* v. *Hawes* (3) and *In re Walbran* (1) was not identical with the language in the present case. The word "equally" points to an equal division between the unmarried daughters of Dr. Grant inter se. The construction

(1) [1906] 1 Ch. 64.

(2) (1853) 3 D. M. & G. 73, 78.

(3) (1880) 14 Ch. D. 614.

for which I contend was adopted in *Mason* v. *Baker* (1) and *In re Davies' Will.* (2)

Sheldon, for the three unmarried daughters of Dr. Harper. The moiety is divisible in equal fourth shares between the three unmarried daughters of Dr. Harper and Dr. Grant or his daughter (as the case may be). This mode of division would be beyond dispute if the testatrix had named the three unmarried daughters. She did not name them because it was uncertain which of them would be unmarried at the date of distribution. A division per capita and not per stirpes is supported by *In re Featherstone's Trusts* (3); *Lugar* v. *Harman* (4); *Butler* v. *Stratton* (5) (where the head-note is inaccurate); *Phillips* v. *Garth* (6); and the rule is so stated in Hawkins on Wills, p. 113; 2nd ed. p. 149.

[SARGANT J. referred to *Kingsbury* v. *Walter* (7), per Lord Davey.]

A. C. Nesbitt, for Dr. Grant. The moiety should be divided in equal half shares, one half to the three unmarried daughters and one half to Dr. Grant: *In re Walbran.* (8) The word "between" imports a division in two shares.

R. M. Pattisson, for Edith Mary Grant, supported the same argument on this point so far as related to the division of the moiety.

SARGANT J. This summons raises an exceedingly difficult question of construction arising on the language of the will. The testatrix, who was a widow, by her will dated November 19, 1908, after bequeathing a certain number of pecuniary legacies, including a legacy of 500*l.* to Dr. Alexander Smeaton Grant "in recognition of friendship and his many kindnesses," directed that the residue of her estate should be converted, and that the trustees should stand possessed of the resulting investments upon trust to pay the income thereof to her sister "Margaret Tait for her life, and after her death to pay and divide the same into two equal moieties, one moiety to be paid to my niece Eugenie Mackinnon, and the other moiety to be divided equally between the unmarried daughters of my brother-in-law Dr. James Harper and Dr. Alexander Smeaton Grant equally."

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(1) (1856) 2 K. & J. 567.
(2) (1860) 29 Beav. 93.
(3) (1882) 22 Ch. D. 111.
(4) (1786) 1 Cox, 250.
(5) (1791) 3 Bro. C. C. 367.
(6) (1790) 3 Bro. C. C. 64.
(7) [1901] A. C. 187, 193.
(8) [1906] 1 Ch. 64.

With regard to the second moiety two questions arise. The first point is whether the second beneficiary or set of beneficiaries to take together with the "unmarried daughters of my brother-in-law Dr. James Harper" are the unmarried daughters of Dr. Alexander Smeaton Grant or Dr. Alexander Smeaton Grant himself, that is to say, whether, to put the gift alternatively in unambiguous language, it is to be read as a gift between the "unmarried daughters of my brother-in-law Dr. James Harper and of Dr. Alexander Smeaton Grant," or is to be read as a gift to the "unmarried daughters of my brother-in-law Dr. James Harper and to Dr. Alexander Smeaton Grant."

The second point which arises is, In what shares is this moiety to be divided between the beneficiaries, when ascertained by my decision upon the first point?

The only relevant facts which I need mention are these, namely, that at the date of her will the testatrix was about sixty-three years of age and the tenant for life, Margaret Tait, was about seventy-four years of age; that Dr. Harper had five daughters living, of whom two were married, and I understood that the other three were of such an age that they might have been married either at that date or shortly after that date. On the other hand at that date Dr. Alexander Smeaton Grant had only one daughter who was then of the age of about four years. The testatrix died on the day after making her will, and the tenant for life died in May, 1913. As to the first point, whether a gift to the children of A. and B. is to be construed as a gift to the children of A. and of B., or as a gift to the children of A. and to B., there is a great deal of authority. The most recent case is *In re Walbran* (1), before Joyce J., in which many of the earlier authorities are referred to. I cannot myself see that the one construction is any more idiomatic or grammatical than the other, but one or two judges have been of a different opinion and have considered that a construction which inserts the word

(1) [1906] 1 Ch. 64.

"of" is less idiomatic than a construction which inserts the word "to," and I do not think that any judge has ever held that a construction which inserts the word "to" is less idiomatic than a construction which inserts the word "of." I am content to take it for the present purpose that either construction is in itself equally permissible, though the balance of authority seems to be in favour of the insertion of the word "to" rather than the insertion of the word "of." In the present case, however, it is material to consider that Dr. Grant was a person to whom the testatrix owed many kindnesses and whom she shewed a desire to benefit by leaving him a legacy of 500*l.*, and I think it is also material to consider that the only daughter of Dr. Grant at the time in question was of the age of four years, and the tenant for life being seventy-four years of age it was extremely unlikely that there would be any married daughter of Dr. Grant at her death so as to make it necessary to draw a distinction between his married and unmarried daughters. Taking these considerations into account, I am of opinion that the beneficiary intended by the testatrix was Dr. Grant himself and not Dr. Grant's unmarried daughters at the time of the death of the tenant for life, and my decision on that point is in entire accordance with the decision of Joyce J. in *In re Walbran.* (1)

I now come to the second point, whether Dr. Grant is to take a half share of this moiety, that is to say, a share equal to that taken by the three unmarried daughters, or whether he is to take in equal fourth shares with them. In my opinion I ought to come to the conclusion that the four persons in question take in equal fourth shares. That seems to me to be the result of the decisions in a number of cases which have been cited to me, and particularly in *Butler* v. *Stratton* (2) and *Lugar* v. *Harman.* (3) The rule is so stated in terms by the late Mr. Vaughan Hawkins in his book on Wills at p. 113. He says that the rule is the same, that is to say, the division is per capita and not per stirpes, where the gift is to A. and the children of B. I do not find in the words of the gift apart from the concluding word "equally," which I will deal

(1) [1906] 1 Ch. 64.

(2) 3 Bro. C. C. 367.

(3) 1 Cox, 250.

with in a moment, anything to alter that prima facie rule of construction, except possibly the word "between" upon which Joyce J. laid some stress in *In re Walbran* (1) as being more applicable to a division in moieties than to a division in thirds or fourths or any larger number of shares. I do not myself think that the word "between" in common parlance and in ordinary use—whatever may be the case as to its etymology or origin—is more applicable to a division in moieties than to a division in other shares, and moreover this result would follow, that if the word "between" is to be taken as dividing the property into moieties only, then there are no words of division between the unmarried daughters of Dr. Harper and they might consequently take as joint tenants. In my opinion the direction to divide the moiety equally between the "unmarried daughters of my brother-in-law Dr. Harper and Dr. Grant" must mean a direction to divide the whole moiety into as many shares as there are beneficiaries, and it is difficult to give effect to that meaning if the word "between" is to be read as dividing the property into moieties rather than into lesser shares. In so deciding I am aware that I am departing from the decision of Joyce J. in *In re Walbran* (1), but I do not think that in the argument before him his attention was directed to this point to the same extent as it was directed to the first point which I have mentioned; and I do not find from the report that the rule stated in the late Mr. Vaughan Hawkins' book or the cases to which I have referred, so far as they bear on this point, were called to his attention. Moreover in *In re Walbran* (1) there was a special reason for making a division in halves on the ground that the person who took in competition with the class was a person who represented a single stirps bearing the same relationship to the testator that the præpositus of the other persons bore, so that the learned judge was making the division which was most probably intended by the testator. In the present case, in which the division is between the unmarried daughters of a brother-in-law of the testatrix and a medical man to whom she was indebted for kindnesses, I cannot see any reason which should induce me to think it more probable that she should give him a half rather than a fourth, so that the circumstances in the present case do not afford the assistance which Joyce J. found in the case before him.

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(1) [1906] 1 Ch. 64.

There is, however, in the present case the word "equally" following the name of the last legatee, Dr. Grant; and I was for some time impressed by that word as possibly meaning that Dr. Grant was to take something which was equal to the whole amount given to the unmarried daughters taken together; but on the whole I am of opinion that I should be attributing too much meaning to the word by that construction. It is equally appropriate to read the word as an emphatic reminder to a person perusing the will that Dr. Grant was to take equally with each of the three legatees. On the whole, therefore, though decisions in cases of this kind are necessarily rather in the nature of guesswork, I think that the probabilities are in favour of the construction which I have adopted, and I propose to make a declaration accordingly that the moiety in question is divisible in equal fourth shares between the three unmarried daughters of Dr. Harper and Dr. Grant.

Solicitors: *Winter & Plowman; Bryson & Wells.*

A. C.

In re WILKIE'S SETTLEMENT.
WADE *v.* WILKIE.

[1913 W. 1915.]

SARGANT J.
1913
Oct. 23, 24.

Settlement—Costs of Proceedings proposed to be taken for the Recovery of Land—Benefit to Estate—Proceedings abandoned—Costs paid by Tenant for Life—Right to be recouped out of Capital—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *s.* 36.

The Court has jurisdiction under s. 36 of the Settled Land Act, 1882, to approve of proceedings once proposed to be taken for the recovery of land alleged to be subject to a settlement and to direct the costs to be reimbursed out of capital notwithstanding that at the date of the application the proceedings have been abandoned and the costs paid by the tenant for life.

ADJOURNED SUMMONS.

This was an originating summons taken out by the plaintiff, D. T. N. Wade, as sole surviving trustee of an indenture of settlement against Dora Emma Wilkie, the present tenant for life in possession, and also the administratrix and sole next of kin of Lewis George, the former tenant for life, and Thomas George, one of the persons contingently entitled in remainder, raising the question whether Dora Emma Wilkie was entitled to be recouped out of the capital of the Abercarn Fawr estate comprised in the settlement a sum of 260*l.* 19*s.* 4*d.*, paid as to 50*l.* part thereof by Lewis George in his lifetime and as to the residue deducted out of income payable to Dora Emma Wilkie as his administratrix, being the amount of certain costs incurred by the plaintiff, at the request of Lewis George and Dora Emma Wilkie, in obtaining advice and taking proceedings for the purpose of recovering possession of the site of a reservoir adjoining and at one time forming part of the Abercarn Fawr estate, but sold to a railway and canal company by a predecessor in title of the settlor subject to a statutory provision for resumption of possession in the event of such reservoir being disused, part of which site had since been acquired from the successors in title of such company by the plaintiff as trustee of the said settlement by way of exchange.

SARGANT J.
1913
WILKIE'S SETTLEMENT, *In re.*
WADE *v.* WILKIE.

The plaintiff or his firm acted as solicitors in the matters in question, and both Lewis George and Dora Emma Wilkie had given a personal indemnity to the plaintiff in case he might not be entitled to reimburse himself out of the estate.

The facts as stated in the plaintiff's affidavit were as follows:

By an indenture dated May 11, 1897, in contemplation of the marriage shortly afterwards solemnized between C. J. Wilkie and Dora Emma George, Lewis George conveyed real estates including the Abercarn Fawr estate to T. Rees and D. T. N. Wade and their heirs in trust for sale, with power to postpone the sale and with wide powers of management until sale, including power to raise costs and expenses attending the execution of any of the powers thereby conferred, and such power of making exchanges as were by the Settled Land Act, 1882, conferred on tenants for life; and it was thereby declared that the proceeds of sale and the rents and profits till sale should be held upon the trusts of an indenture of even date.

By the indenture of even date the trust moneys were settled in trust to pay the income to Lewis George during his life, and after his death, in the events which happened, to pay the income to Dora Emma George during her life without power of anticipation, and after her death in trust for the children of C. J. Wilkie and Dora Emma George as therein mentioned with remainders over; and it was declared that it should be lawful for the trustees to determine how any expenses incurred in or about the execution of the trusts of the now stating indenture or the indenture of even date ought to be borne; and that any trustee being a solicitor might charge professional or other charges for business done by him or his firm in relation to the trusts.

T. Rees died in 1907, and Lewis George died on December 13, 1909, intestate, letters of administration being granted to Dora Emma Wilkie, who was his sole next of kin. The Abercarn Fawr estate had been the property of Lewis George and his ancestors since the year 1716. In the years 1801 and 1815 the surface only of certain lands adjoining the Abercarn Fawr estate which then formed part of the said estate and then belonged to one Thomas George, an ancestor of Lewis George, were conveyed by Thomas George to the Monmouthshire

Railway and Canal Company. The minerals under such adjoining lands so conveyed to the company were comprised in the indenture of settlement and formed part of the Abercarn Fawr estate.

The land so sold to the company was acquired by the company for the purpose of constructing thereon a reservoir for supplying water for their canal, and the reservoir was duly constructed between the years 1796 and 1810. In the year 1876 or thereabouts the dam of the reservoir burst, and ever since that date the reservoir had been disused by the Monmouthshire Railway and Canal Company and their successors in title, the Great Western Railway Company, the company merely letting the site of the reservoir to an agricultural tenant for grazing purposes.

Owing to a coal pit being sunk in the neighbourhood the surface of the Abercarn Fawr estate became available for building purposes, but the trustee was advised that it would be difficult if not impossible to lay out the land for building unless the site of the old reservoir or some portion thereof could be acquired in order that a road might be constructed and also a sewer at a level which would carry off the drainage from the adjoining property comprised in the settlement.

Under the provisions of the Act of Parliament of 1792 (32 Geo. 3, c. cii.) it was provided that, if the reservoir was discontinued or disused for the space of ten years, then after the expiration of the ten years the original owner or his successors in title could take steps for resuming possession of the land, the first step being a vesting order from the commissioners appointed under the Act. In the year 1909, at the request and with the full approval of Lewis George and Dora Emma Wilkie and after obtaining the opinion of counsel, the plaintiff took the necessary steps prescribed by the Act for obtaining the appointment of commissioners whose duty it would be to vest in him as trustee all property which the Monmouthshire Railway and Canal Company acquired in 1801 and 1815 and which had fallen into disuse for ten years.

In due course a meeting of the commissioners was convened and they made an order vesting the property in the plaintiff as trustee. The Great Western Railway Company, however, refused to comply with the vesting order and stated that they would not give up possession of the land unless compelled to do so by the Court. The plaintiff then submitted a case for the joint opinion of two learned counsel, who advised him that they considered his prospects of success doubtful, and that as a trustee he would be well advised not to take any further action against the company. Having regard to this opinion the plaintiff then approached the company with a view to a compromise and was ultimately successful in arranging a compromise on the terms that the plaintiff should convey a small portion of land forming part of the Abercarn Fawr farm which the Company required for widening their railway line and that the company should sell and release by way of exchange their estate and interest in about 3½ acres of the site of the old reservoir which was required for the development of the adjoining Abercarn Fawr estate at a price which was stated to be less than one half of the market value. The two conveyances were not executed till 1910, after the death of Lewis George, but the whole of the bill of costs now in question was incurred in his lifetime and 50*l.* part thereof was paid on account by him. The bill of costs, amounting to 260*l.* 19*s.* 4*d.*, was delivered by the plaintiff's firm to Dora Emma Wilkie after the death of Lewis George, and the residue thereof had been deducted out of income payable to her as administratrix of Lewis George.

L. W. Byrne, for the trustee, argued the case for the remaindermen. The powers contained in the settlement are inapplicable and in any case, the trustee having paid himself out of income, the powers contained in the settlement are at an end. Sect. 36 of the Settled Land Act, 1882 (1), is equally inapplicable to a case where the proceedings have been abandoned and the costs paid.

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(1) Settled Land Act, 1882, s. 36: "The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement."

W. H. Gover, for Dora Emma Wilkie. The case is within s. 36 of the Settled Land Act, 1882, which applies to proceedings proposed to be taken in the same way as to proceedings actually taken. The application can be properly entertained on behalf of the personal representative of the tenant for life out of whose income the costs have been paid and notwithstanding that at the date of the application the proceedings have been abandoned. *Sheppard* v. *Sheppard* (1) shews that the payment of costs out of a particular fund does not determine their ultimate incidence. [He also referred to *In re Earl of Aylesford's Settled Estates* (2); *In re Ormrod's Settled Estate* (3); *Stott* v. *Milne*. (4)]

L. W. Byrne in reply. The case is not within s. 36. According to the natural meaning of the language of that section the Court can only allow the costs of proceedings proposed to be taken at the time of the application. A step which has been then abandoned can hardly be described as a thing proposed to be done.

Sargant J. In my opinion this is a case in which I can properly make an order under s. 36 of the Settled Land Act, 1882, and in which I also think that I could have made an order apart from the jurisdiction conferred by that Act. It is not necessary for me to go into the questions arising in the case further than to say that the only reason which has been suggested why an order should not be made is that the proceedings in question never ripened into actual proceedings. Proceedings were proposed to be taken, but after advice had been sought from eminent counsel the proceedings were not in fact prosecuted because in the opinion of counsel they would not have been successful. It is now suggested by Mr. Byrne that the Court cannot on the application ex post facto of the tenant for life or his administratrix sanction proceedings which had been proposed to be taken but which were not actually taken, although it could sanction the costs of proceedings which had actually been taken. In my opinion that is not so. I think that for the purpose of

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(1) (1863) 33 Beav. 129.

(2) (1886) 32 Ch. D. 162.

(3) [1892] 2 Ch. 318.

(4) (1884) 25 Ch. D. 710.

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this section proceedings proposed to be taken are put on exactly the same footing as proceedings actually taken; and, inasmuch as in the present case proceedings for the recovery of land within the meaning of the section were proposed to be taken at one time, these costs can be allowed, although in the result the proceedings were not actually taken. My decision on this point relieves me from considering whether the application to the commissioners was itself in the nature of a proceeding. If it was, and I am inclined to think that it was, then those costs at any rate are costs of proceedings actually taken; but, whether that is so or not, the other proceedings by way of intended action were abandoned and never taken. Nevertheless, for the reasons which I have given, I think that the costs of those proposed proceedings can be now allowed. In my opinion, in order that the costs of proposed proceedings should be allowed, it is not necessary that they must be proceedings proposed to be taken at the date when the order is made. The bill of costs in the present case must be referred to a taxing Master for moderation, and I will make the order in respect of the amount to be so ascertained.

Solicitors: *Woodcock Ryland & Parker, for Wade & Son, Newport, Monmouthshire.*

A. C.

In re CHERRY'S TRUSTS.

ROBINSON *v.* TRUSTEES FOR WESLEYAN METHODIST CHAPEL PURPOSES (REGISTERED).

SARGANT J.
1913
Oct. 23.

[1913 C. 1793.]

Charity—Custodian Trustee—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *ss.* 2, 4—*Public Trustee Rules,* 1912, *r.* 30.

Under the Public Trustee Act, 1906, s. 4, sub-s. 3, a corporate body empowered to undertake trusts within r. 30 of the Public Trustee Rules, 1912, can be appointed and has power to act as custodian trustee of real, leasehold, or personal estate devised or bequeathed upon charitable trusts. The prohibition against the Public Trustee himself accepting such a trust imposed by s. 2, sub-s. 5, of the same Act is personal to the Public Trustee; and there is nothing in the appointment of such a corporate body as custodian trustee which abridges or affects the powers or duties of the Official Trustee of Charity Lands or the Official Trustees of Charitable Funds within the meaning of s. 2, sub-s. 5.

The persons having power to appoint new trustees by statute or otherwise, in case a vacancy arises, can properly appoint a custodian trustee under s. 4 of the Public Trustee Act, 1906.

ADJOURNED SUMMONS.

This was an originating summons taken out by the trustees of the Wesleyan Methodist Chapel at Bampton Grange, Westmorland, and the superintendent preacher of the circuit, to which the above-named corporation and the Attorney-General were made defendants, raising the questions (1.) whether the defendant corporation might properly be appointed and had power to act as custodian trustee of real, leasehold, or personal estate devised and bequeathed upon charitable trusts or for charitable purposes; and (2.) whether the appointment now in question was a valid and effectual appointment.

By a deed poll of October 4, 1866 (enrolled in Chancery on December 14, 1866), it was declared that certain persons and others the trustees for the time being acting in the trusts of the deed should stand possessed of all donations and bequests which should be made to them for the benefit of any funds then or thereafter constituted by the authority or with the consent of the Wesleyan Methodist Conference for the purpose of promoting the acquisition and erection of, or relief or benefit of or in connection with, chapels and other hereditaments settled upon the trusts therein mentioned or other like trusts, and of all donations and bequests for the benefit of, or in connection with, some particular property settled upon such or the like trusts as aforesaid, upon trust, as to all such donations and bequests as to or upon which any trust, charge, or obligation was created or imposed by the donors or testators thereof, to pay and apply such donations and bequests accordingly, and, subject as aforesaid, and also as to such donations and bequests as to or in respect of which no trust, charge, or obligation had been or should be created or imposed by the donors or testators thereof, upon trust to appropriate, pay, and apply the same to or for the benefit of such one or more of the funds thereinbefore mentioned as the said Conference should from time to time direct.

By another deed poll of October 7, 1910 (enrolled in the Central Office on October 12, 1910), the former deed was confirmed and extended to all realty and personalty, and it was expressly provided that the trustees should hold any real, leasehold, or personal estate of which they should be duly appointed custodian trustees upon and subject to the regulations prescribed by s. 4 of the Public Trustee Act, 1906, and the authorized rules under such Act or the statutory regulations and authorized rules for the time being in force respecting custodian trustees.

By an order of July 4, 1911, the Charity Commissioners, in pursuance of the Charitable Trustees Incorporation Act, 1872, granted to the trustees of these deeds a certificate of incorporation under the above name.

The testator, Stephen Cherry, who died in 1910, by his will dated April 29, 1908, gave to the " trustees for the time being " of the Wesleyan Methodist Chapel at Bampton Grange, situate in the parish of Bampton in the county of Westmorland, a legacy of 50*l.*, to be invested and the income applied in keeping the chapel in repair.

The plaintiffs (other than the Reverend Seth Swithenbank) were the present trustees of the chapel, which was held by them upon the trusts of the model deed for Wesleyan Methodist chapels dated July 3, 1832; and the legacy was paid to and invested by them in the purchase in their names of 70*l.* 7*s.* 1*d.* guaranteed preferential stock of the Midland Railway Company. The Reverend Seth Swithenbank was the superintendent preacher of the circuit of the Wesleyan Methodist Connexion in which the chapel at Bampton Grange was situate.

By clause 44 of the model trust deed of July 3, 1832, in case the number of trustees should, by reason of death, incapacity, or refusal to act, be reduced to five, a power of appointing new trustees of the chapel and premises out of persons nominated by the superintendent preacher for the time being of the circuit was given to the old trustees for the time being or the major part of them. (1)

By an indenture dated January 30, 1913, and made between eight named persons (therein described as the managing trustees of the said chapel at Bampton Grange) of the first part, the Reverend Seth Swithenbank (therein described as the superintendent preacher of the circuit) of the second part, and the defendant corporation of the third part (after reciting the will of the testator, and that the parties thereto of the first part were the then trustees of the said chapel which was held upon the trusts of the model deed for Wesleyan Methodist chapels dated July 3, 1832, and that the defendant corporation were entitled by virtue of the Public Trustee Act, 1906, and the rules made thereunder to act as custodian trustee), it was witnessed, first, that in exercise of the powers in that behalf vested in them by the Trustee Act, 1893, and by the Trustees Appointment Act, 1890, and by the Public Trustee Act, 1906 (2), and of every or any other power enabling them in that behalf, the managing trustees (with the consent and on the nomination of the said Seth Swithenbank as such superintendent preacher as aforesaid) thereby appointed the defendant corporation to be custodian trustee of the said sum of 70*l.* 7*s.* 1*d.* stock of the Midland Railway upon and for the trusts affecting the same by virtue of the will of the said testator; and, secondly, that in pursuance of the provisions of the Public Trustee Act, 1906, in that behalf the managing trustees directed that until further order the income of the said trust fund should be paid to the superintendent preacher for the time being of the said circuit.

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(1) This clause of the model trust deed is set out in full in 34 Ch. D. at p. 371.

(2) See note on p. 95, post.

Doubts having arisen as to the validity of this appointment, the present originating summons was taken out, under the certificate of the Charity Commissioners, for the determination of the question.

Owen Thompson, for the plaintiffs. The appointment is good. The exceptions imposed by s. 2, sub-ss. 4 and 5 (sub-s. 5 being the material sub-section in the present case), of the Public Trustee Act, 1906, are personal to the Public Trustee and do not apply to a body corporate, such as the defendant corporation, authorized to act as custodian trustee under r. 30 of the Public Trustee Rules, 1912. Sect. 4, sub-s. 3, of the Public Trustee Act, 1906, is a distinct enabling provision, and ought not to be limited in its application by considerations which only arise in the case of the Public Trustee himself.

The defendant corporation is a corporate body within the meaning of r. 30 of the Rules of 1912. The (repealed) r. 36 of the Public Trustee Rules, 1907, expressly mentioned a "body corporate established for charitable or philanthropic purposes." There is no reason for giving a narrower meaning to r. 30 of the Rules of 1912, though it is silent on the point. By r. 6 of the Rules of 1912 the Public Trustee is authorized to accept as custodian trustee "any trust created or declared by any trust instrument." *In re Coates to Parsons* (1) shews that the statutory power of appointment under the Conveyancing Act, 1881, s. 31, or the Trustee Act, 1893, s. 10, applies to charitable trusts, and that there is no distinction between charitable and other trustees for the purposes of a general enactment. The appointment of the defendant corporation was therefore properly made by the trustees for the time being of the chapel: Trustees Appointment Act, 1890, s. 3; Trustee Act, 1893, s. 10; and Public Trustee Act, 1906, s. 4, sub-s. 1 (*c*). The effect of such an appointment does not in any way affect the position of the Official Trustees of Charitable Funds under the

(1) (1886) 34 Ch. D. 370.

Charitable Trusts Acts. Their powers and duties, if and when called into play, remain unaffected.

Sheldon, for the defendant corporation.

Austen-Cartmell, for the Attorney-General. First, according to the true construction of the Public Trustee Act, 1906, the defendant corporation is prohibited from becoming custodian trustee of a charity. The intention of the Legislature was not to interfere with the powers and duties of the Official Trustee of Charity Lands or the Official Trustees of Charitable Funds. The latter are constituted the proper custodians of this legacy under s. 51 of the Charitable Trusts Act, 1853. (1)

[SARGANT J. Their powers and duties under that section only arise on the application of the trustees of the legacy or under an order of the Court.]

This is the meaning of the prohibition against the Public Trustee accepting a religious or charitable trust contained in s. 2, sub-s. 5, of the Public Trustee Act, 1906, and this prohibition is imported into s. 4, sub-s. 3, where the words "in like manner as to the Public Trustee" impose similar limitations where any other corporate body is appointed under that sub-section instead of the Public Trustee.

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(1) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 51, enacts: "The secretary for the time being of the said Board, and such other public officer or officers as the Lord Chancellor shall appoint, shall be Official Trustees of Charitable Funds, and where trustees or other persons having in their names, or in the name of any deceased person of whom they are representatives, in the books of the Bank of England, or of the East India or South Sea Company, or of any other public company, any annuities, stock, or shares, or holding any government or parliamentary or other securities in trust for any charity, shall be desirous to transfer or deposit the same to or with the said official trustees in trust for such charity, or where any persons shall be desirous of transferring or depositing as aforesaid any annuities, stocks, shares, or securities for discharging any legacy or charge given or made to or for the benefit of any charity, or where it shall appear to the Court of Chancery, or to any judge of such Court, or of any District Court of Bankruptcy, or county court having jurisdiction under this Act, that any annuities, stock, shares, or securities held in trust for any charity ought, for the purpose of security or convenient administration, to be transferred or deposited as aforesaid, it shall be lawful for such Court or judge to order the transfer or deposit of such annuities, stock, shares, or securities to or with such official trustees."

The Official Trustees of Charitable Funds are now constituted by the Charitable Trusts Act, 1887 (50 & 51 Vict. c. 49), s. 4.

Secondly, no new trustees can be properly appointed of this legacy. It is given to the trustees for the time being of the chapel, and the new trustees of the legacy are thus automatically provided for as in the case of a gift to a vicar and churchwardens. Thirdly, the defendant corporation is not such a corporate body as is contemplated by r. 30. It is not a body entitled to undertake trusts generally, but only certain limited trusts as defined by the instruments under which it is constituted.

No reply was called for.

SARGANT J. This application raises two questions, one of great public importance, the other only concerning the parties to the actual application. The summons relates to a small charitable legacy of 50*l.* only, but the considerations which determine my decision will necessarily apply to much larger funds. The question is whether a certain body of trustees who have been incorporated and are empowered to act and are acting for the purpose of holding funds belonging to the Wesleyan Methodist Connexion can be appointed custodian trustees under the Public Trustee Act, 1906. The body in question has its origin in the following deeds and documents. There is first a deed of October 4, 1866, by which a body of individual trustees was constituted for the purpose of holding trust funds that might be given for the benefit of the Wesleyan Methodist body or of any particular chapel or trust in connection with that body, and then there was an extension deed of October 7, 1910, extending the objects and powers of the former deed. Each deed was duly enrolled in Chancery or in the Central Office, and by a certificate or order of the Charity Commissioners made by virtue of the Charitable Trustees Incorporation Act, 1872, the trustees of those deeds were incorporated as a body of trustees with perpetual succession and seal in accordance with the provisions of the Act. As a matter of fact nothing is said in the document of incorporation as to custodian trustees, but I do not think that affects my judgment in one way or the other. The particular fund in question has arisen in the following way. Under a deed, which was in accordance with the model deed of July 3, 1832, for the grant of Wesleyan Methodist chapels, a certain Wesleyan Methodist chapel, which is situate in Bampton Grange in Westmorland, was assured to trustees upon the trusts of the model deed; and by his will dated April 29, 1908, the testator, Stephen Cherry, who died in 1910, bequeathed a sum of 50*l.* free of legacy duty to the trustees for the time being of the Wesleyan Methodist chapel situate at Bampton Grange to be by them invested and the income thereof devoted to keeping the chapel in repair. That legacy is now invested in a small amount of guaranteed preferential stock of the Midland Railway Company, and by a deed of January 30, 1913, and made between the trustees of that chapel of the first part, the Reverend Seth Swithenbank, who was the superintendent preacher of the circuit, and was the person whose approval was to be given to the appointment—and it is not suggested that he was not the proper person to authorize what was done—of the second part, and the body of trustees incorporated under the order of the Charity Commissioners which I have already mentioned of the third part, the trustees purported in exercise of the powers vested in them by the Trustee Act, 1893, and by the Trustees Appointment Act, 1890, and by the Public Trustee Act, 1906, and of any other powers them enabling, to appoint this incorporated body of trustees to be custodian trustee of this particular sum of preferential stock.

The question now raised before me on this summons, issued under the certificate of the Charity Commissioners, is whether that appointment of this incorporated body as custodian trustee is a good appointment. One general objection of great importance has been made to the appointment. It is said that a certain disqualification which is imposed by s. 2 upon the Public Trustee under the Public Trustee Act, 1906, preventing him from acting as a trustee for religious or charitable purposes, applies equally to any other incorporated body which may be appointed as custodian trustee under s. 4 of the same Act. In order to deal with this objection it is necessary to refer to some parts of s. 2 and also to some parts of s. 4 of the Act. By s. 2 of the Act power is given for the Public Trustee to act in the matter of trusts, and, amongst other things, to act as a custodian trustee—a phrase which, I am told, is a completely new one and is first used in this Act. Then by sub-ss. 4 and 5 it is provided as follows: Sub-s. 4: "The Public Trustee shall not accept any trust which involves the management or carrying on of any business, except in the cases in which he may be authorised to do so by rules made under this Act, nor any trust under a deed of arrangement for the benefit of creditors, nor the administration of any estate known or believed by him to be insolvent." Sub-s. 5: "The Public Trustee shall not accept any trust exclusively for religious or charitable purposes, and nothing in this Act contained, or in the rules to be made under the powers in this Act contained, shall abridge or affect the powers or duties of the Official Trustee of Charity Lands or Official Trustees of Charitable Funds." Then under s. 4 power is given to the Public Trustee to be appointed as custodian trustee of any trust, and, if and when he is appointed custodian trustee, his position in consequence of that appointment is defined by some subsequent sub-sections of that section. In this respect sub-s. 3 is of importance, which provides: "The provisions of this section shall apply in like manner as to the Public Trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee as custodian trustee."

Looking at s. 4 alone it is plain that any body corporate can act as custodian trustee with the like consequences and in the like manner which would ensue if the Public Trustee were appointed as custodian trustee, and in the section itself there is no limitation whatever of the trusts in respect of which either the Public Trustee or any incorporated body may be appointed as custodian trustee. But it is said that those words "the provisions of this section shall apply in like manner as to the Public Trustee to any banking or insurance company" bring in not only as against the Public Trustee but as against a banking or other company the disqualifications or prohibitions contained in sub-s. 4 and sub-s. 5 of s. 2. The question really is whether on the true construction of sub-ss. 4 and 5 the prohibitions or restrictions are prohibitions or restrictions personal to the Public Trustee and therefore not to be applied to any other corporation which may be appointed in his stead under s. 4. It was first contended by Mr. Austen-Cartmell that the trusts under s. 4 were necessarily limited to trusts not excluded by sub-ss. 4 and 5 of s. 2, and that therefore the trusts with regard to which a banking or insurance company could be appointed were as closely limited as the trusts with regard to which the Public Trustee might be appointed. In my opinion that is not the right way of reading ss. 2 and 4 as a matter of construction. In my opinion s. 4 must be read as applying prima facie to all trusts, and then on that footing sub-ss. 4 and 5 of s. 2 must be applied for the purpose of excluding certain defined trusts; and I have to determine whether sub-ss. 4 and 5 of s. 2, which do not in terms apply to s. 4, are to be brought into s. 4 by virtue of any analogy or any considerations of public policy. I do not myself see any reason why they should be. Looking at sub-s. 4 of s. 2 it seems to me to be clear that that provision is made because of the special position of the Public Trustee. The Public Trustee is a public corporation. He is made a corporation by the Act. In certain cases of mistake or breach of trust by him a right is given to the cestui que trust to resort to the public funds, and it was obviously important to provide that the Public Trustee should not undertake trusts involving certain risks. I asked Mr. Austen-Cartmell whether he could suggest any reason why a banking company willing to act as custodian trustee under s. 4 should not be able to act in respect of a trust under a deed of arrangement for the benefit of creditors or in the administration of an estate that is believed to be insolvent, and I did not get from him any satisfactory answer. In my judgment the language of s. 4 and the general considerations derived from the object of the Act are quite sufficient to lead to the conclusion that the restrictions contained in s. 2 are a personal disqualification only intended to be imposed upon the Public Trustee himself. I think the same considerations apply to the first words of sub-s. 5 of s. 2. I can well see very good reasons why a public official, a public corporation like the Public Trustee, should not be mixed up in trusts which were exclusively for religious or charitable purposes.

In my opinion, therefore, no valid ground has been suggested for holding that the disqualifications imposed on the Public Trustee by sub-ss. 4 and 5 of s. 2 apply to a body corporate; but it was further suggested that the later words of sub-s. 5 might have that effect, because it was urged that under the Charitable Trusts Acts the Official Trustees of Charitable Funds were practically constituted custodian trustees of charitable funds, and that the effect of appointing companies to be custodian trustees in the case of funds held for religious or charitable purposes would be to withdraw from the ambit of the authority of the official trustees funds which might otherwise have been within their jurisdiction or invested in their names. With regard to that point it is material to observe that under s. 51 of the Charitable Trusts Act, 1853, the official trustees only take such charitable funds as are transferred to them by the trustees. It is only when people come in voluntarily and desire to get the aid of the official trustees that the official trustees are appointed. Of course under other sections the Court may in certain instances declare that the trust funds shall vest in the official trustees. In the present case the persons who have possession of these funds are not desirous of appointing the official trustees to hold them, so that there is no question of the official trustees dealing with the funds at present. Further, it was conceded by Mr. Owen Thompson and not in any way disputed by Mr. Austen-Cartmell that if at any time hereafter the Court should think it desirable that this fund should be vested in the official trustees it would be just as competent to the Court to make an order vesting the funds in the official trustees and to appoint them custodian trustees after as well as before the appointment of the defendant corporation as custodian trustees. It seems to me, therefore, that there is no sufficient reason for saying that the appointment of the defendant corporation as a custodian trustee will in any way abridge or affect the powers and duties of the Official Trustees of Charitable Funds. The only difference will be that the custody of the fund will be in this permanent corporate body instead of in the individual trustees, and incidentally that in this respect there will not in future be as strong a motive for voluntarily transferring the funds to the Official Trustees of Charitable Funds. On the general point of construction, therefore, I decide that a body of this kind incorporated in this way is empowered under s. 4 of the Public Trustee Act, 1906, to be appointed a custodian trustee of any trust, and that the prohibitions contained in sub-ss. 4 and 5 of s. 2 apply only to the Public Trustee, and do not apply to the companies or other body corporate referred to in sub-s. 3 of s. 4 of the Act.

Two other minor points have been taken. It is said that the trustees are not the proper persons to make this appointment and that the charity fund must necessarily from time to time belong to the persons who are the trustees for the time being of the chapel. But these persons who are making the appointment are the persons who have the power of appointing new trustees of the chapel, and in my opinion have the power of appointing new trustees of this legacy whether that is the mere consequence of the appointment of new trustees of the chapel or whether it ought to be in terms a separate appointment. That being so, they appear to me to fall within the very words of s. 4, sub-s. 1 (*c*), of the Public Trustee Act, 1906. They are the persons having the power to appoint new trustees. It was conceded that it was not necessary in order that persons should have the power to appoint a custodian trustee that an occasion should have arisen on which it was possible to appoint a new trustee, that is to say, it is not necessary that there should be a vacancy in the office of trustees. That was not contended by Mr. Austen-Cartmell, and as at present advised I think that it could not have been successfully contended. I think it is only necessary to find out who are the persons in whom the power of appointing new trustees is vested if an occasion arises, and then it follows that they are the persons who have the power of appointing the custodian trustee under the Public Trustee Act, 1906.

Another point was made which may be of a little more general importance, namely, that the corporate body which it is desired to appoint, or which has in terms been appointed in this instance, is not within r. 30 of the Public Trustee Rules, 1912, which provides : " Any incorporated banking or insurance or guarantee or trust company or other body corporate for the time being empowered (by the Act of Parliament charter memorandum of association deed of settlement or other instrument constituting it or defining its powers) to undertake trusts, shall be entitled to act as custodian trustee." The main objection taken—because Mr. Austen-Cartmell withdrew an objection he took towards the close of the argument founded on the fact that this body could only undertake a certain limited class of trusts—was founded on the alleged impossibility of pointing out the instrument within the meaning of that rule under which this body had the power to undertake trusts. I do not myself feel that difficulty at all. The trustees under the two documents to which I have already referred had arranged that they and the individual successors who they might have chosen to succeed them should undertake the trusts, and then the Charity Commissioners exercising the jurisdiction conferred on them under the Charitable Trustees Incorporation Act, 1872, constituted those persons a body corporate. To my mind the two deeds of trust and the order of the Charity Commissioners constituting that body as a body corporate formed together an instrument or instruments—of course the singular includes the plural—under which that body corporate was entitled to undertake trusts. In my opinion, therefore, that objection also fails.

The result is that the questions raised by the originating summons ought to be answered by declaring that the defendants, the corporation in question, may properly be appointed and have power to act as custodian trustee of real, leasehold, or personal estate devised or bequeathed upon charitable trusts or for charitable purposes within the scope of the deeds of October 4, 1866, and October 7, 1910, and of the order of July 4, 1911 ; and, further, that the appointment which has in fact been made is an effective appointment.

Solicitors: *Rawle, Johnstone & Co., for Cooper & Sons, Manchester ; Treasury Solicitor.*

NOTE.—Trustee Act, 1893 (56 & 57 Vict. c. 53), enacts:—

Sect. 10: "(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid."

Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19), after reciting 13 & 14 Vict. c. 28, therein called "the Act of 1850," "An Act to render more simple and effectual the titles by which congregations and societies for purposes of religious worship or education in England and Ireland hold property for such purposes," as the same Act is extended by 32 & 33 Vict. c. 26, therein called "the Act of 1869," enacts:—

Sect. 3: "(1.) The power for the appointment of new trustees conferred by the Conveyancing and Law of Property Act, 1881, or any other statutory power for the same purpose for the time being in force, shall apply to all land acquired and held on trust for any purpose to which the Act of 1850 or the Act of 1869 or this Act applies.

"(2.) Any statutory power for the appointment of new trustees which is for the time being in force may be exercised either by the person or persons and in the manner provided by that statutory power, or by the person or persons and by resolution at a meeting, or in any other mode in which, under the instrument creating the trust or any other instrument, the appointment of a new trustee in place of a deceased trustee can be effected."

Public Trustee Act, 1906 (6 Edw. 7, c. 55), enacts:—

Sect. 2: "(1.) Subject to and in accordance with the provisions of this Act and rules made thereunder, the Public Trustee may, if he thinks fit—

"(*a*) act in the administration of estates of small value;
"(*b*) act as custodian trustee;
"(*c*) act as an ordinary trustee;
"(*d*) be appointed to be a judicial trustee;
"(*e*) be appointed to be the administrator of the property of a convict under the Forfeiture Act, 1870.

"(2.) Subject to the provisions of this Act, and to the rules made thereunder, the Public Trustee may act either alone or jointly with any person or body of persons in any capacity to which he may be appointed in pursuance of this Act, and shall have all the same powers, duties, and liabilities, and be entitled to the same rights and immunities and be subject to the control and orders of the Court, as a private trustee acting in the same capacity.

"(3.) The Public Trustee may decline, either absolutely or except on the prescribed conditions, to accept any trust, but he shall not decline to accept any trust on the ground only of the small value of the trust property.

"(4.) The Public Trustee shall not accept any trust which involves the management or carrying on of any business, except in the cases in which he may be authorised to do so by rules made under this Act, nor any trust under a deed of arrangement for the benefit of creditors, nor the administration of any estate known or believed by him to be insolvent.

"(5.) The Public Trustee shall not accept any trust exclusively for religious or charitable purposes, and nothing in this Act contained, or in the rules to be made under the powers in this Act contained, shall abridge or affect the powers or duties of the Official Trustee of Charity Lands or Official Trustees of Charitable Funds."

Sect. 4: "(1.) Subject to rules under this Act the Public Trustee may, if he consents to act as such, and whether or not the number of trustees has been reduced below the original number, be appointed to be custodian trustee of any trust—

"(*a*) by order of the Court made on the application of any person on whose application the Court may order the appointment of a new trustee; or

"(*b*) by the testator, settlor, or other creator of any trust; or

"(*c*) by the person having power to appoint new trustees."

"(2.) Where the Public Trustee is appointed to be custodian trustee of any trust—

"(*a*) The trust property shall be transferred to the custodian trustee, as if he were sole trustee, and for that purpose vesting orders may, when necessary, be made under the Trustee Act, 1893.

"(*b*) The management of the trust property and the exercise of any power or discretion exerciseable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are hereinafter referred to as the managing trustees).

"(*c*) As between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustee shall have free access thereto and be entitled to take copies thereof or extracts therefrom.

"(*d*) The custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including the power to pay money or securities into Court), unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise, but, unless he so concurs, the custodian trustee shall not be liable for any act or default on the part of the managing trustees or any of them.

"(*e*) All sums payable to or out of the income or capital of the trust property shall be paid to or by the custodian trustee: Provided that the custodian trustee may allow the dividends and other income derived from the trust property to be paid to the managing trustees or to such person as they direct, or into such bank to the credit of such person as they may direct, and in such case shall be exonerated from seeing to the application thereof and shall not be answerable for any loss or misapplication thereof.

"(*f*) The power of appointing new trustees, when exerciseable by the trustees, shall be exerciseable by the managing trustees alone, but the custodian trustee shall have the same power of applying to the Court for the appointment of a new trustee as any other trustee.

"(*g*) In determining the number of trustees for the purposes of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee.

"(*h*) The custodian trustee, if he acts in good faith, shall not be liable for accepting as correct and acting upon the faith of any written statement by the managing trustees as to any birth, death, marriage, or other matter of pedigree or relationship, or other matter of fact, upon which the title to the trust property or any part thereof may depend, nor for acting upon any legal advice obtained by the managing trustees independently of the custodian trustee.

"(*i*) The Court may, on the application of either the custodian trustee, or any of the managing trustees, or of any beneficiary, and on proof to their satisfaction that it is the general wish of the beneficiaries, or that on other grounds it is expedient, to terminate the custodian trusteeship, make an order for that purpose, and the Court may thereupon make such vesting orders and give such directions as under the circumstances may seem to the Court to be necessary or expedient.

"(3.) The provisions of this section shall apply in like manner as to the Public Trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee as custodian trustee."

Public Trustee Rules, 1907 (since repealed), provided:—

Rule 36: "(1.) The bodies corporate entitled to act as custodian trustee shall be any such incorporated banking or insurance or guarantee or trust company or friendly society and any such body corporate established for charitable or philanthropic purposes as may be approved by the Public Trustee and the Treasury."

Public Trustee Rules, 1912, provide:—

Rule 6: "Subject to the Act and these Rules the Public Trustee is authorised— . . . .

"(*d*) to accept as custodian trustee any trust created or declared by any trust instrument;"

Rule 7: "The Public Trustee may if he thinks fit—

"(1.) act as custodian trustee of a trust which involves the management

SARGANT J.
1913
CHERRY'S TRUSTS, *In re.*
ROBINSON *v.* TRUSTEES FOR WESLEYAN METHODIST CHAPEL PURPOSES.

or carrying on of any business, but upon the conditions that (*a*) he shall not act in the management or carrying on of such business, and (*b*) he shall not hold any property of such a nature as will expose the holder thereof to any liability except under exceptional circumstances and when he is satisfied that he is fully indemnified or secured against loss ;"

Rule 30: "Any incorporated banking or insurance or guarantee or trust company or other body corporate for the time being empowered (by the Act of Parliament charter memorandum of association deed of settlement or other instrument constituting it or defining its powers) to undertake trusts shall be entitled to act as custodian trustee, but for so long a time only as such body corporate shall not, by any prospectus circular advertisement or other document issued by it or on its behalf, state or hold out that any liability attaches to the Public Trustee or to the Consolidated Fund of the United Kingdom in respect of any act or omission of such body corporate when so acting."

A. C.

C. A.
1913
Oct. 27, 28 ; *Nov.* 5.

ORAM *v.* HUTT.

[1912 O. 148.]

Maintenance of Suit—Common Interest—Trade Union—Slander on Officer as such—Action by Officer—Indemnity by Union against Costs—Ultra vires.

A trade union has no legal common interest in a slander action brought by one of its officers, although that officer is slandered by way of his office as well as personally and the union is thereby adversely affected.

Payment of the officer's costs out of the funds of the union in pursuance of an indemnity given by the union before action is therefore obnoxious to the law of maintenance and ultra vires.

Alabaster v. *Harness* [1895] 1 Q. B. 339, followed.

Decision of Swinfen Eady J. [1913] 1 Ch. 259, affirmed.

APPEAL from a decision of Swinfen Eady J. (1)

The question raised by the action was whether the payment by a trade union of the costs of a slander action brought by one of its officers, who had been slandered by way of his office as well as personally, was obnoxious to the law of maintenance and ultra vires.

The facts are fully stated in the report of the case in the Court below and were shortly as follows:

The plaintiff was a member of the Warwickshire Miners'

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(1) [1913] 1 Ch. 259.

Association, a trade union registered under the Trade Union Acts, 1871 and 1876.

The defendants Hutt and Johnson were members of the executive committee in 1907 and 1908, and the other defendants were the trustees.

In 1907 Pat McNicholas, a member who was suspicious as to the accounts of the association, which he wished to have audited by chartered accountants, made various inflammatory speeches at public meetings, in which he accused various officers, and particularly Johnson, the general secretary, of misconduct in the affairs of the association, suggesting (inter alia) that the association was not conducted in a straightforward manner and that the balance-sheet was false. He also accused the various lodges, including the Newdigate lodge, of not accounting for moneys received, and wrote a libel concerning Dewis, the Newdigate lodge secretary.

These speeches produced a widespread feeling of unrest among the members and threatened, unless refuted, to impair the efficiency if not the existence of the association. Many members refused to pay their contributions.

In these circumstances the executive committee passed the following resolution on May 16, 1907: "Resolved that the Miners' Association, the general secretary, the executive committee and any of the lodge officials take legal proceedings against Pat McNicholas on behalf of the Miners' Association or in their own names, and that the Miners' Association indemnify the general or lodge officials who take proceedings." This resolution was confirmed by the council on June 24, 1907.

In consequence of and in reliance on this resolution Johnson, the general secretary, commenced an action for slander on May 16, 1907, and Dewis, the Newdigate lodge secretary, commenced an action for libel and slander on May 17, 1907.

The solicitor of the association acted for the plaintiffs in both actions.

On February 24, 1908, Johnson recovered judgment for 1000*l.* damages and costs. A consent judgment for 25*l.* without costs was then entered for Dewis.

Pending the actions a sum of 174*l.* cash had been paid by the treasurer to the solicitor out of the funds of the association on account of costs. On July 10, 1908, nothing being recoverable from McNicholas, a sum of 775*l.* cash, the balance of 949*l.*, the plaintiffs' costs in the two actions, was paid by the treasurer to Johnson out of the funds of the association, and Johnson gave the solicitor a cheque for the same amount. These payments were made out of income in the treasurer's hands which had not been paid over to the trustees. The payments were not sanctioned by any specific resolution, as it was considered that the resolution of May 16, 1907, was sufficient.

In this action the plaintiff originally asked for a declaration that the payments were ultra vires and an order for repayment by all the defendants, but on it appearing that neither Hutt nor the trustees had in fact made any payment, the plaintiff merely asked for a general declaration against all the defendants and an order for Johnson to repay the 775*l.*

Swinfen Eady J. held, following *Alabaster* v. *Harness* (1), that the association had no power to authorize its officers to take proceedings for slander at the expense of the association, and that the payments made in respect of the costs of such proceedings were invalid on the ground that the arrangement offended against the law of maintenance. He further took the subsidiary view that the act of the association was ultra vires, inasmuch as its rules did not specifically provide for the step that was taken. He therefore made a declaration that the payments were illegal and an order against Johnson for repayment of the 775*l.*

From this decision Johnson appealed.

The appeal was heard on October 27 and 28, 1913.

Hon. Frank Russell, K.C., and *J. W. Manning*, for the appellant. The action of the association in supporting the appellant in his action against McNicholas did not amount to maintenance. The old doctrine of maintenance has been considerably whittled down in recent years: *British Cash and Parcel Conveyors, Ld.* v. *Lamson Store Service Co.* (2); *Findon* v. *Parker.* (3) The

(1) [1895] 1 Q. B. 339.
(2) [1908] 1 K. B. 1006.
(3) (1843) 11 M. & W. 675, 679.

test of maintenance now is whether the person accused is officiously intermeddling in or has no bona fide interest in the action. Here there was no officious intermeddling by the association and it certainly had a bona fide interest in the action. The attacks of McNicholas were having a very deleterious effect on the association and the proceedings taken by the appellant against McNicholas put a stop to them. These proceedings were a step which the officers of the association thought essential in the interests of the association. It is said that there was no reason why the proceedings should not have been taken by the association in its own name; but if they had it would have been open to McNicholas to say that he was not attacking the association but individuals, and the association might have failed in its action, in which event its position would have been worse than it was before. Further the case comes within the recognized exception to the rule against maintenance, namely, the relation of master and servant: *Elborough* v. *Ayres.* (1) The appellant was a servant of the association. *Alabaster* v. *Harness* (2) is distinguishable from this case. There there was no issue which was common to Harness and Tibbits. Here there were two issues in the action in which the association was vitally interested, namely, (1.) whether the association was being carried on in a straightforward manner, and (2.) whether the balance-sheet put forward by the appellant was fraudulent. The allegations made by McNicholas were as much libels on the association as on the appellant, who was its general secretary. Further in *Alabaster* v. *Harness* (2) there was no connection between Harness and Tibbits. Here, as between the association and the appellant there existed the relation of master and servant. *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (3), on which Swinfen Eady J. relied, was the case of the instigation of an action by a union in which it had no possible concern. It does not apply to a case like the present, where the association was attacked through its officials.

On the question of ultra vires it is admitted that there is no rule specifically authorizing the payments in question, but it is submitted that every corporation has as ancillary to its undertaking power to make payments which are necessary to preserve its existence. [They also referred to *Pechell* v. *Watson* (1); *Flight* v. *Leman* (2); Bullen and Leake on Pleadings, 3rd ed., p. 350.]

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(1) (1870) L. R. 10 Eq. 367.

(2) [1894] 2 Q. B. 897; [1895] 1 Q. B. 339.

(3) (1906) 22 Times L. R. 274.

Hon. Sir Charles Macnaghten, K.C., and *Dighton Pollock*, for the respondent. The judgment of Swinfen Eady J. is right on both grounds, namely, (1.) that the payment was ultra vires the association and (2.) that it constituted maintenance at law. On the first point, it was beyond the powers of the association to apply its funds or any part of them to any purpose not authorized by its rules: *Yorkshire Miners' Association* v. *Howden*. (3) It is conceded that there is nothing in the rules to authorize specifically the application of the funds of the association in making the payments in question. It is not because litigation may be useful to the association that its funds may be applied in furthering it. To justify the payment it must be shewn that it comes within the rules. The case is similar to that of a limited company. A company can only act within the ambit of its statutory powers. There is nothing in the rules to justify the association in dedicating any part of its funds to the payment of the litigation of other persons. Voluntary payments like these are entirely beyond the powers of the association. The association might have brought the action itself. It was unquestionably libelled.

As regards the question of maintenance it is impossible to differentiate this case from *Alabaster* v. *Harness*. (4) The two cases are about as parallel as any two cases could be. The law is that a person cannot assist another in an action unless he has a common interest with him in it, and it is not a common interest that he desires him to succeed in it. It is obvious that a person cannot have an interest in the subject-matter of an action for libel brought by another person. The only person interested in the damages is the person libelled. The mischief against which the law of maintenance is directed is the "wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse": per Fletcher Moulton L.J. in *British Cash and Parcel Conveyors, Ld.* v. *Lamson Store Service Co.* (1) As to whether it makes any difference whether or not the person maintained is successful in his action see the observations of Coleridge C.J. in *Bradlaugh* v. *Newdegate.* (2) The act of maintenance was a tortious act, and therefore money paid under the tortious arrangement must be repaid. *Scott* v. *National Society for the Prevention of Cruelty to Children* (3), in which an inspector of the society was slandered and it was held that the society had no interest in maintaining an action for slander by him, is exactly on all fours with this case so far as the question of master and servant is concerned. [They also referred to the definitions of maintenance in Co. Litt. 369a and 4 Bl. Com., p. 134.]

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(1) (1841) 8 M. & W. 691.

(2) (1843) 4 Q. B. 883.

(3) [1905] A. C. 256, 263.

(4) [1895] 1 Q. B. 339.

J. W. Manning in reply.

Cur. adv. vult.

Nov. 5. The following written judgments were delivered :—

LORD PARKER OF WADDINGTON. In this case I have come to the conclusion that the judgment of Swinfen Eady J. (4) was right and ought to be affirmed for the following reasons. The moneys which the defendant Johnson was ordered to repay to the association were paid to him pursuant to the indemnity contained in the resolution of the executive committee of the association passed on May 16, 1907, and confirmed by the council of the association on June 24, 1907. This indemnity and the payments made under it are impeached as amounting to maintenance, and therefore illegal and ultra vires. It may well be that a corporation cannot commit the common law offence of maintenance. It may also well be that in the present case no civil action for damages could arise out of anything done by the association. I cannot doubt, however, that an agreement which if entered into by an individual would be void as an agreement to commit an illegal act would if entered into by a corporation be similarly void, and if this is so, payments made pursuant to any such agreement would be ultra vires unless they could be justified on other grounds.

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(1) [1908] 1 K. B. 1006, 1014.

(2) (1883) 11 Q. B. D. 1.

(3) (1909) 25 Times L. R. 789.

(4) [1913] 1 Ch. 259.

The first question for decision, therefore, is whether the agreement by the association to indemnify any of its officers who took proceedings against McNicholas for libel was void on the ground of maintenance. In my opinion Swinfen Eady J. was bound and this Court is bound to hold this agreement void unless this case can be distinguished from the case of *Alabaster* v. *Harness*. (1) Several grounds of distinction were suggested in argument, but upon consideration I think there is little substance in them. A person who maintains the action of another can only justify by proving the existence of a common interest or bringing himself within certain recognized exceptions to the common law rule. A common interest means an interest recognized by law in the subject-matter of the action or some issue between the parties to the action. It was decided in the case in question that a libel action is a personal action which in point of law concerns only the parties to it—the matters legally at issue are merely whether the plaintiff has been libelled, and if so to what damages he is entitled. The mere circumstance that in the libel action there must or may arise questions of fact in the determination of which a third party has an interest will not constitute a common interest sufficient to justify maintenance by such third party. In the libel action by Tibbits which Harness maintained there might arise, and did in fact arise, a question as to the efficacy of the electric belt in which Harness was interested. Indeed, the libel on Tibbits consisted in charging him with professional incompetence on the ground that he had reported favourably on a belt which was alleged to be worthless. From a business point of view it was vital to Harness after the publication of that libel to prove that the belt had the merits appearing in Tibbits' report. This, however, was held insufficient to justify his maintaining the libel action. Similarly in the present case it may have been vital for the association from a business point of view to controvert certain of the allegations made by McNicholas against their officers the truth of which would be in issue in the slander action by Johnson or the libel and slander action by Dewis. Nevertheless, according to the case in question, this would not constitute a common interest justifying the association in maintaining such actions, the matters legally at issue being merely whether the plaintiffs in those actions had been slandered or libelled, and to what damages they were entitled. I do not, therefore, see how this case can be distinguished from the case of *Alabaster* v. *Harness* (1), nor do I think that the association can be brought within any of the recognized exceptions.

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(1) [1894] 2 Q. B. 897; [1895] 1 Q. B. 339.

The question remains whether the payments in question were justified on any other ground. As pointed out by Lord Alverstone C.J. in *Greig* v. *National Amalgamated Union of Shop Assistants, Warehousemen and Clerks* (2), a mere power to give legal aid to its members in protection of their interests could not justify an act which would be otherwise illegal. But even if the objection based on maintenance were out of the way in the present case, I am of opinion that the payments could not be justified. Such payments were certainly not justified by express words of the rules of the association. It may possibly be that when a trade union has under its rules power to apply its funds in the attainment of specified objects, certain ancillary powers reasonably necessary for the attainment of those objects can be implied, but it would, I think, be stretching this principle too far to hold that a trade union was justified in defraying the costs of legal proceedings by its members whenever an indirect benefit might be expected to result from or had resulted from the proceedings in question. I have come to the conclusion, therefore, that the appeal must be dismissed.

LORD SUMNER. The association's payment and Mr. Johnson's receipt of the sum in question in this appeal can be justified only if the payment can be shewn to have been within the association's implied powers. Clearly no express power covers it. How far the association may spend its money on actions brought to defend itself or its officers we need not say. This limit at least must be placed on any implied powers, that they do not extend

(1) [1895] 1 Q. B. 339.

(2) 22 Times L. R. 274.

to cover acts which in the association itself would be actionable torts, and if committed by natural persons would be indictable misdemeanours. Hence the question is, "Did the association maintain Mr. Johnson in his action against McNicholas ?" That the action of maintenance is now in small favour and that indictments for maintenance have been drawn by few among living men are nothing to the point. Maintenance has not ceased to be a part both of the law of torts and of the law of crimes. At the request and by the direction of the association, and on its indemnity as to costs, Mr. Johnson sued McNicholas for slandering him. There is no question here of the business of insurance or of mutual protection associations. I think it makes no difference to the validity of the payment whether the association paid Mr. Johnson money for the action in advance, or paid him sums as it proceeded, or promised to pay his bill of costs when it was over and did so, thus giving effect to an unlawful contract. The association prompted Mr. Johnson, who was doubtless nothing loth, to bring his own action to clear his own character. In this action it had no legal interest: to its fruits it had no legal right; the wrong that that action was brought to vindicate was no wrong done to the association. True, there was an action which the association itself might have brought; true, the slanders on the association and on Mr. Johnson were uttered by McNicholas in the same speech and in the same breath; true that to some extent they consisted of the same charge. Still the association and Mr. Johnson had no common interest in the latter's action. They suffered under similar wrongs caused by identical charges made against them severally on the same occasions. They possessed identical causes of action; they had a common aim, namely, the confutation of McNicholas and his reduction to silence. But a common cause is not a common interest. Victory for either would serve the other's turn. Doubtless it did not much matter which sued, if one judgment against McNicholas was obtained. Still their wrongs, their causes of action, their damages, and their costs were all separate. The association had no right to fight Mr. Johnson's battles.

Alabaster v. *Harness* (1), in my opinion, so far as the question of maintenance is concerned, covers this case. I have neither the right nor the wish to doubt or to disregard it. Two distinctions have been suggested. First it is said that the motives both of Mr. Johnson and the association were honourable and their wrongs grievous—and that was true—while the motives of Harness were dubious and he deserved all that was said of him —which may be true also. I think this is no distinction. Whether an act is an act of maintenance or not depends on its own character, not on the character of the maintainer. Next it is said that, while Tibbits was beaten in his action against Alabaster, in Mr. Johnson's action it was McNicholas who was the loser. I think this makes no difference either. Whether the tort of maintenance is one in which damage is of the essence of the action, as in an action for personal injuries, or is one in which the mere invasion of the plaintiff's legal right imports damage and is sufficient to give a cause of action, need not be decided now. In *Bradlaugh* v. *Newdegate* (1) Lord Coleridge C.J. decided the case on the latter view, treating the plaintiff's success or failure in the maintained action as merely going to the quantum of his damages in the action for maintenance, and some text-writers so say. (Clerk and Lindsell on Torts, 4th ed. p. 664; Jenks' Digest of English Civil Law, bk. ii. pt. iii. p. 497; Halsbury's Laws of England, vol. i., title Action, p. 52, par. 81.) In *Metropolitan Bank* v. *Pooley* (2) Lord Selborne's language suggests the contrary view, and this is adopted definitely in Pollock on Torts, 9th ed. p. 345. No case has been cited where the prosecutor's defeat in the maintained action has been a defence to an indictment for the misdemeanour of maintenance, and it may be as much against public interest (which is the foundation of this head of wrongs) to stir up an action which lies indeed, but would never have been brought if the tort-sufferer had been left to himself, as to maintain an action which does not lie at all. Be this as it may, in either case the maintainer for his part has done all he can to harass the party sued. If the maintained action fails it is not because he has not done his best to commit maintenance and committed it, but because the party against whom it is brought has committed some tort or

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(1) [1895] 1 Q. B. 339.

(1) 11 Q. B. D. 1.

(2) (1885) 10 App. Cas. 210, 218.

breach of contract. What the maintainer himself does is the same in either case. It is not a question of reasonable and probable cause for believing the maintained action to be a just one. This goes farther. It is an action for maintaining actual litigation in being; see *Pechell* v. *Watson* (1); *Flight* v. *Leman.* (2) Accordingly, in view of the questions here in issue the association's conduct is tortious in its character and therefore is beyond its implied powers. Whether or not McNicholas could have been sued successfully in view of his own indefensible slanders on Mr. Johnson is not material. It only remains to observe that the relations between Mr. Johnson and the association and the circumstances of the case excluded the application of any of the recognized exceptions to the rule as to maintenance, notably those relating to master and servant. I agree in the judgment of Swinfen Eady J. and think that the appeal must be dismissed.

WARRINGTON J. To succeed in this appeal the appellant must satisfy us that the payment in question was one which it was in the power of the association to make, for it is not disputed that unless it was so the judgment appealed from is correct. Such an application of the funds of the association is not in terms authorized by the rules. But the appellant contends that it is impliedly authorized as incidental to the main objects of the association. It may be conceded that such a body may properly apply its funds in litigation instituted for the purpose of asserting a right of the association, or preventing the infliction of a wrong upon the association, or recovering damages for a wrong already inflicted upon it. But the question here is as to the application of its funds in payment of the costs of litigation started by another person for recovery of damages for a personal wrong inflicted on himself. Is such an application of its funds within the powers of the association? The learned judge has held that it is not, because the transaction amounted to maintenance on the part of the association. That it did amount to maintenance is, I think, concluded by the decision of the Court of Appeal in *Alabaster* v. *Harness.* (3) In that case it was said that to expose or stop certain slanders upon Tibbits might benefit Harness by removing a slur upon the goods in which he dealt, and it was contended that this circumstance afforded a sufficient ground for holding that he had a common interest with Tibbits in his suit. The contention here is that the result of Johnson's action was expected to be and was in fact to stop the slanders of McNicholas and to re-establish the confidence of the miners in the association, and that this is a sufficient common interest with Johnson to justify the taking up of his action. In my judgment the nature of the alleged interest is the same in both cases. It was held in *Alabaster* v. *Harness* (1) not to be sufficient to prevent the conduct of Harness from being "maintenance," and it must in my opinion be so held here. If the transaction amounted to maintenance on the part of the association, then the payment in question was made in pursuance of an illegal contract, and, in my opinion, it is impossible to hold that to make such a payment can be within the implied powers of the association. I think, therefore, that the judgment of the learned judge was right and this appeal fails.

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(1) 8 M. & W. 691.
(2) 4 Q. B. 883.
(3) [1895] 1 Q. B. 339.

Solicitors: *Bennett & Ferris, for W. H. Pownall, Nuneaton; Maude & Tunnicliffe, for Simpson, Bowring & Smith, Derby.*

W. I. C.

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(1) [1895] 1 Q. B. 339.

C. A.
1913
Nov. 7.

In re GORDON AND ADAMS' CONTRACT.
In re PRITCHARD'S SETTLED ESTATE.

[1913 G. 269.]

Settlement—Settled Land—Power of Appointment—Title Sale—Compound Settlement—Trustees for the Purposes of the Settled Land Acts—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 5, 8; *s.* 38.

By his will dated in 1891 the testator appointed trustees, and empowered his wife by deed, will, or codicil to appoint as she might think fit all or any part of his property, and in default he gave all his freehold estates to the use of his wife for life, with remainder to the use of W. P. G. for life, with divers remainders over; and the testator empowered his trustees to sell any part of his freehold estates thereinbefore given. The testator died in 1891, and by her will his widow appointed W. P. G. her sole executor, and in exercise of her power of appointment appointed the real estate devised by her husband's will to the use of W. P. G. for life, with remainder to the use of his first and every other son successively in tail male, with remainders over. The testatrix died in 1892. In 1912 W. P. G., in exercise of his powers as tenant for life in possession, contracted to sell part of the settled estate. The purchaser objected that, there being no trustees for the purposes of the Settled Land Acts, the vendor could not make a good title:—

Held, that, the general power of appointment having been fully exercised by the widow, there was a resettlement of the estate, and there being no existing interests or charges having priority over that resettlement, the original settlement created by the testator's will was at an end, and consequently there were no trustees having a power of sale, and trustees for the purposes of the Settled Land Acts of the widow's will must be appointed.

Decision of Eve J. [1913] 1 Ch. 561, reversed.

APPEAL from a decision of Eve J. (1)

By his will dated June 15, 1891, John Pritchard appointed the Reverend William Henry Wayne and John Arthur Austin (afterwards Sir John Arthur Austin, K.C.B.) trustees thereof, and empowered his wife, Jane Pritchard, by deed, will, or codicil, at any time or times, to appoint, dispose of, give, devise, or bequeath, in such manner and whether for her own benefit or otherwise as she might think fit, all or any part of his property of what nature or kind soever, and in default of and until any such disposition, gift, devise, or bequest thereof, and so far as any such should not extend, the testator gave all his freehold estates to the use of his wife and her assigns for her life, with remainder to the use of William Pritchard Gordon and his assigns for his life, with divers remainders over, and the testator empowered the trustees and trustee of his will to sell any part or parts of his freehold estates thereinbefore given.

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(1) [1913] 1 Ch. 561.

The testator died on August 19, 1891, and by her will, dated December 5, 1891, his widow appointed the said William Pritchard Gordon her sole executor, and in exercise of the aforesaid power of appointment appointed the real estate devised by the will of her husband to the use of the said William Pritchard Gordon and his assigns for life, without impeachment of waste, with remainder to the use of his first and every other son successively according to seniority in tail male, with remainders over. The limitations to William Pritchard Gordon included a power to jointure any wife of his. The testatrix died on February 25, 1892, and on July 2, 1912, William Pritchard Gordon, in exercise of his powers as tenant for life in possession, contracted with John Adams for the sale to him of part of the settled estates.

On investigating the title the purchaser raised the objection that there were no trustees for the purposes of the Settled Land Acts of the compound settlement created by the two wills, and he insisted that the vendor could not make a title until such trustees were appointed. To this the vendor replied that as there was a continuing power of sale in the trustees of John Pritchard's will, they were trustees for the purposes of the Acts, and no further appointment of trustees was necessary.

Upon a vendor and purchaser summons taken out by William Pritchard Gordon, Eve J. held that the contention of the vendor was right, and from that decision the purchaser appealed.

Lyttelton Chubb, for the appellant. With the exercise of the general power of appointment given by the testator John Pritchard to his wife the settlement created by his will came to an end, and there is no existing power of sale in the trustees of that will. The power of sale given to those trustees could only operate so long as there were any limitations created by the will which were not put an end to by the exercise of the general power of appointment. The exercise of that power destroyed all other powers conferred by the will. The sale by the tenant for life is under the Settled Land Act, 1882, s. 2, sub-ss. 1, 5, 8, and it is necessary that trustees for the purposes of the Act should be appointed of the compound settlement created by the two wills.

G. B. Rashleigh, for the respondent. The vendor is really tenant for life under the will of John Pritchard. The limitations in the will of the testatrix made in exercise of her power of appointment must be read into John Pritchard's will which created the power. The question is out of what estate the vendor's life tenancy is carved. It is submitted that it is out of the estate of John Pritchard. The original estate for life under John Pritchard's will still endures, and there is an existing power of sale in the trustees of that will. The estate of the original testator has never devolved on any other person in fee. The widow might, no doubt, by disposing of the fee, have destroyed the power of sale, or she might have created a fresh power of sale in new trustees, but she did not do so. She only created a new life estate in a person alive at the death of the original testator. The power of sale under the will of John Pritchard is undisturbed by what she has done.

An appointee under a general power of appointment takes his estate under the instrument creating the power: *In re Earl of Devon's Settled Estates* (1); Sugden on Powers, 8th ed. p. 470.

There is no decision that where the property in settlement has not vested in any one else in fee there is any necessity to appoint new trustees. The power of sale is still subsisting in the original trustees: *In re Brown's Settlement.* (2) [He also referred to *In re Lord Sudeley and Baines & Co.* (3)]

COZENS-HARDY M.R. With the greatest respect to Eve J., I think he has not given due effect to the law applicable to such cases.

The facts are extremely short. The testator by his will appointed trustees and gave his wife a general power of appointment and subject thereto he settled the property on trust for his wife for life with remainder to the use of William Pritchard Gordon and his assigns for his life with divers remainders over. The testator died, and his widow by her will in exercise of her general power of appointment appointed the property devised by his will to the same gentleman for life with the usual limitations in strict settlement, including a power to jointure any wife of his. The testatrix is dead, and W. P. Gordon, who is undoubtedly the tenant for life, has entered into a contract for the sale of part of the property. The objection has been taken by the purchaser that there are no trustees for the purposes of the Settled Land Acts, to which the answer has been made that there are trustees with a power of sale under the will of the original testator.

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(1) [1896] 2 Ch. 562, 567.
(2) (1870) L. R. 10 Eq. 349.
(3) [1894] 1 Ch. 334.

In the present case the vital point is that there is no interest under the will of the original testator still subsisting, no jointure, no portions charge, and no prior estate whatever. The property has been disposed of under the general power of appointment mentioned in the settlement, and there being nothing antecedent to it, it seems to me that the original settlement is spent, exhausted, and done with, and that the trustees of the testator's will have no more power to sell the property than they would have had after it had gone through all the limitations of a strict settlement.

Then it is said that the appointment has to be read into the instrument creating the power, and therefore that the tenant for life takes under the will of the testator, and not under that of his widow. I am quite unable to assent to that view. The law has made a clear distinction between general and special powers. A special power must be read into the instrument creating it, but that cannot be treated as applicable to general powers. The law is accurately stated in Sir George Farwell's book on Powers (2nd ed.), at p. 286: "There is an important distinction between general and particular powers in this respect. The donee of a general power is virtually absolute owner of the property over which his power extends; and he is to be regarded as absolute owner for the purpose of considering the application of the rule against perpetuities to him. The donee of a particular power is not absolute owner." The position would be different if an antecedent estate had been kept alive, but if there is an estate unincumbered, in the sense that the person exercising the power of appointment can do what he likes with the property, he is in the position of an owner, and the original settlement is at an end, spent and done with, and the person claiming under the appointment takes under the will of the donee of the power, and not under the original settlement.

The difficulty can be got over here by appointing trustees for the purposes of the Settled Land Act of the widow's will, and this can be easily done in chambers. The objection taken by the purchaser is well founded, and the appeal must be allowed.

SWINFEN EADY L.J. I am of the same opinion. This is a case in which there is a general power of appointment which has been fully exercised. The whole estate has been resettled, and there are no interests or charges having priority to the resettlement. The original settlement is entirely at an end. On these short grounds I concur in the view of the Master of the Rolls.

PHILLIMORE L.J. I agree. It seems to me that when a general power of appointment has been given, and all prior charges have been exhausted, the execution of the power brings the settlement to an end.

Solicitors: *A. B. Chubb & Pettitt, for W. J. Pitt, Bridgnorth; Church, Adams & Prior, for Nicholls & Taylor, Bridgnorth.*

G. A. S.

In re MUDGE.

[1899 M. 810.]

C. A.
1913
Nov. 7.

Marriage Settlement—Covenant to settle after-acquired Property—"Interest in expectancy."

A testatrix by her will, dated in 1862, gave a fifth share of her residuary estate to her daughter W. for life, with remainder to her children, but if she should die without issue (which event happened) "her share to go to her next of kin as if she had not been married." In 1866 J., another daughter of the testatrix, married, and by her marriage settlement covenanted that any real or personal property to which she then was entitled for any estate or interest whatsoever in reversion, remainder, or expectancy should be settled upon the trusts of the settlement. W. died in 1912 without issue, and leaving J. her sole next of kin:—

Held, that the interest which J. had at the date of the settlement in the settled share of W. was either a mere spes successionis, or, having regard to the authorities, including *In re Parsons* (1890) 45 Ch. D. 51, must be treated as such, and therefore was not assignable at law.

Held, further, that inasmuch as the covenant did not relate to any defined spes successionis it was too vague to be enforceable in equity; and that consequently the property to which J. became entitled as next of kin of her sister was not comprised in the settlement.

Decision of Neville J. [1913] 2 Ch. 92, reversed.

APPEAL from a decision of Neville J. (1)

Mary Mudge, widow, by her will dated June 26, 1862, after making certain specific bequests, gave the residue of her property whatsoever and wheresoever (in the events which happened) equally amongst her four daughters and her son William, and directed that the share of her daughter Williamina should be for her separate use, the income thereof to be paid to her for life without power of anticipation, and after her decease to her children who should attain twenty-one or marry and in such manner as she should appoint, "and if she shall die without issue who shall live to attain a vested interest her share to go to her next of kin as if she had not been married."

The testatrix died in 1864 leaving her surviving four daughters, namely, Rosdew Mary, Jane Isabella, Katherine Mary, and Williamina Caroline, and a son William.

In June, 1866, Jane Isabella Mudge intermarried with Robert

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(1) [1913] 2 Ch. 92.

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Martin, and their marriage settlement contained the following clause :—

"And it is hereby agreed and declared that if the said Jane Isabella Mudge now is, or if during the said intended coverture she or the said Robert Martin in her right at one and the same time and from one and the same source shall become seised or possessed of or entitled to any real or personal property of the value of 50*l.* and upwards for any estate or interest whatsoever in possession, reversion, remainder or expectancy" (except jewels, &c.) "then and in every such case the said Robert Martin and Jane Isabella Mudge and all other necessary parties shall at the cost of the said trust estate" convey the said real and personal property to or otherwise cause the same to be vested in the trustees of the settlement.

Robert Martin died in 1871.

Katherine Mary Mudge, William Mudge, and Rosdew Mary Mudge died unmarried in the years 1876, 1892, and 1899 respectively.

Williamina Mudge married Edwin Selby in 1865. She survived her husband and died in December, 1912, without issue, leaving her sister Mrs. Martin her sole next of kin.

Part of the share of Williamina Selby in the residuary estate of the testatrix was represented by a sum of 1189*l.* 9*s.* 5*d.* India 3½ per cent. Stock in Court, and Mrs. Martin presented a petition for payment out of that sum to herself on the ground that it was not caught by the covenant in her marriage settlement to settle after-acquired property.

Neville J. held that under the will of the testatrix there was upon the death and failure of issue of Williamina Mudge a contingent gift of her share to a class of whom the petitioner Mrs. Martin was one, and the benefit she took under that gift was an "interest in expectancy" to which she was entitled at the date of her marriage and which was caught by the covenant in the settlement.

From this decision Mrs. Martin appealed.

Norton, K.C., and *Iselin*, for the appellant. At the date of her marriage settlement the appellant had with reference to the property now in question a mere spes successionis. The gift in the will to the next of kin of Williamina was a contingent gift to an artificial class, the members of which could not be ascertained until the happening of the event upon which the gift was contingent. The chance which the appellant had, at the time of her marriage, of becoming a member of that class was not an "interest in expectancy" within the meaning of the covenant. It was not an interest in law at all.

The older authorities were examined by Kay J. in *In re Parsons.* (1) That case decides that no one can have any estate or interest at law or in equity in the property of a living person to which he hopes to succeed as heir-at-law or next of kin of such living person. He cannot have more than a spes successionis.

In re Simpson (2) and *In re Green* (3) are later cases on the subject. See also *Allcard* v. *Walker.* (4) In *Clowes* v. *Hilliard* (5) a testator gave his residuary estate in trust for his three daughters and their issue, with an ultimate trust, if all of them died without issue, for the persons who would have been entitled to the residue under the Statute of Distributions in case the testator had then died intestate. It was held (the daughters being living and unmarried) that persons who would have been the testator's next of kin if the daughters had all died unmarried had only an expectation and not an interest which would enable them to maintain a suit for administration of the estate. That was followed by Chitty J. in *Fussell* v. *Dowding.* (6) See also *Molyneux* v. *Fletcher.* (7)

There is no distinction between this case and those in which there is a reference to statutory next of kin. Next of kin means next of kin at the death of the propositus: *Gundry* v. *Pinniger.* (8) In *In re Michell's Trusts* (9), where a wife at the time of her marriage was entitled under a will to a contingent reversionary interest in personalty which during the coverture became vested, but did not come into possession until after the determination of the coverture, it was held that the property was not within a covenant to settle future property of the wife. Jessel M.R. there said: "The husband could not effectually settle, either by himself or with his wife, property in expectancy, that is, property which they had not got." A mere expectancy cannot be conveyed. The person who has it can covenant to convey it when it ripens into an interest.

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(1) 45 Ch. D. 51.
(2) [1904] 1 Ch. 1.
(3) [1911] 2 Ch. 275.
(4) [1896] 2 Ch. 369.
(5) (1876) 4 Ch. D. 413.
(6) (1884) 27 Ch. D. 237, 240.
(7) [1898] 1 Q. B. 648.
(8) (1852) 1 D. M. & G. 502.
(9) (1878) 9 Ch. D. 5, 10.

The words "in expectancy" seem to have been taken from the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 1. *In re Johnson* (1) affords an interpretation of the words as used in that section. They are to be found in Key and Elphinstone's Precedents in Conveyancing, 9th ed. vol. ii. p. 577. In this case the words are mere redundancy.

Further we submit that the covenant in this respect is too vague to be enforced by a Court of Equity. It does not deal with any defined spes successionis, but with one which would apply to any succession to the estate of anybody in which Mrs. Martin might be interested as one of the next of kin: *In re Clarke* (2); *Tailby* v. *Official Receiver.* (3)

Romer, K.C., and *A. L. Morris*, for the respondents. We do not dispute the law as to a mere spes successionis, but we submit that this is an interest in property which does not come within it.

In *In re Parsons* (4) Kay J. draws a distinction between a gift to such of the kindred of A. as shall be living at his death and a gift to those who shall then be his statutory next of kin, and says that he is unable to agree that the cases are parallel. The distinction is recognized in *In re Gray's Settlement.* (5) This is more than a mere spes successionis; it is an interest in a definite property.

The reasoning in *In re Parsons* (6) is based upon this, that in such a limitation to the next of kin of a person no one is able to say "I must if I live be a member of that class." Here Mrs. Martin was in a position so to say.

(1) [1891] 3 Ch. 48.
(2) (1887) 36 Ch. D. 348, 355.
(3) (1888) 13 App. Cas. 523, 529.
(4) 45 Ch. D. 63.
(5) [1896] 2 Ch. 802.
(6) 45 Ch. D. 51.

[Cozens-Hardy M.R. referred to *Davis* v. *Angel.* (1)]

The mode of expression here has not the effect of giving a mere spes successionis. It would be an extension of *In re Parsons* (2) so to hold.

Iselin in reply.

[Cozens-Hardy M.R. We only wish to hear you upon the question that the covenant being for value ought to be held binding: *Meek* v. *Kettlewell.* (3)]

The covenant is too vague in this respect to be enforceable. In *In re Ellenborough* (4) Buckley J. said that the point of *Meek* v. *Kettlewell* (3) was that the assignment was not of property, but of a mere expectancy. It is not, of course, disputed that the interest of Mrs. Martin would have been bound if it had fallen into possession during the coverture.

Cozens-Hardy M.R. This is an appeal from the decision of Neville J., and it raises the question whether a fund which has been paid into Court is or is not caught by a covenant in a marriage settlement. Neville J. has held that it is. From that decision the appeal is brought.

The material facts may be very shortly stated. Mrs. Mudge by her will dated in 1862 gave her residue, in certain events, amongst her four daughters and a son, and she directed that the share of her daughter Williamina should be for her separate use, the income to be paid to her for life without power of anticipation, and after her decease to her children who should attain twenty-one or marry in such shares as she should appoint, and "if she shall die without issue who shall live to attain a vested interest her share to go to her next of kin as if she had not been married." The testatrix died in 1864. Jane Isabella, one of the daughters, married in 1866, and in her marriage settlement there was a clause for the settlement of after-acquired property which is in these words: "It is hereby agreed and declared that if the said Jane Isabella Mudge now is . . . . seised or possessed of or entitled to any real or personal property of the value of 50*l.* and upwards for any estate or interest whatsoever in possession, reversion, remainder or expectancy" (with certain exceptions) "then and in every such case the said Robert Martin and Jane Isabella Mudge and all other necessary parties shall at the cost of the said trust estate convey the said real and personal property to or otherwise cause the same to be vested in the said trustees or trustee."

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(1) (1862) 4 D. F. & J. 524, 529.

(2) 45 Ch. D. 51.

(3) (1843) 1 Ph. 342.

(4) [1903] 1 Ch. 697, 701.

The husband died in 1871, and during the coverture no property was acquired by the wife, and that is why I omitted to read that portion of the covenant which relates to property to which during the coverture she might become entitled. Williamina married and died in 1912 without issue, and Mrs. Martin is in the events which have happened her sole next of kin, and she claims that the fund in Court should be paid out to her. The settlement trustees, doing what they are bound to do, assert that this money is caught by the covenant, and so Neville J. has held.

Three points have been raised in this case. In the first place, what was the nature of the interest which Mrs. Martin the married woman had at the date of the settlement? It was merely a spes successionis, or, if that is not an accurate term (and perhaps in the circumstances it is not), it was an interest which, by a long series of authorities which it is impossible for us to question, has been treated as equivalent to a spes successionis and subject to all the same incidents. At the moment of the marriage nobody could say who would be the next of kin of Williamina when she died. Nobody could tell. In the events that have happened no doubt Mrs. Martin happens to be that person. Just as it has been held that an interest under a limitation to what is often spoken of as an artificial class of next of kin, namely, the persons who would have been next of kin under the statute if there had been an intestacy, is a kind of spes successionis, so I think this is. I cannot draw any distinction between the case in which statutory next of kin are referred to and the present case where it is provided that Williamina's share is to go to her next of kin as if she had not been married. I think, therefore, that whatever might be said in principle in support of Mr. Romer's contention, it is too late for us to act upon any other rule than that which has been settled by a very long series of authorities, which are summed up in Kay J.'s elaborate judgment in *In re Parsons.* (1) Mrs. Martin's interest was not property that could be assigned at law; there was nothing to assign; it was not property; it was not a contingent interest in property, and it was not a future interest in property. It could only be dealt with, if at all, by means of a contract for value in the instrument, and must be dealt with on that footing.

Then the question arises, is her interest caught by the covenant in the settlement? It is said that although a spes successionis cannot be assigned it can be dealt with by contract, and it is contended (and there is a good deal of force in this argument) that the word "expectancy" in the covenant must have some meaning and effect given to it. In other documents and under other circumstances an "expectancy" may well mean a future interest either in remainder or reversion, but it is said that in this case both "remainder" and "reversion" are mentioned and that the word "expectancy" must have some other meaning given to it. I think the better view on this part of the case is that the word "expectancy" is mere redundancy and that no meaning whatever ought to be attached to it. It is not necessary to express a conclusion on that because I think there is a further difficulty in the way of supporting the decision of Neville J. This was a covenant entered into in 1866, and we must remember that it is not dealing with any defined spes successionis; it would apply to the estate or interest of any person in the world in which this lady might be interested as one of the next of kin. Is not a covenant of that kind too vague and too uncertain to have any effect given to it? Nothing happened, of course, during the coverture in relation to Mrs. Martin's interest. Williamina survived Mr. Martin, and the interest in question did not accrue during the coverture at all. I think the better view is to hold that the covenant really is of such a nature that it cannot be regarded as enforceable, and ought not to be enforced by a Court of Equity. I am impressed with *Meek* v. *Kettlewell* (2), a decision of Lord Lyndhurst affirming Wigram V.-C. That was a case of a definite expectancy, an expectancy on the death of a particular individual, and all that was said there was that an assignment by a voluntary deed of such an expectancy has no force or effect at all, there is no property which it would pass, but that if it is an assignment for value then equity will help it, as it will help almost any transaction which though in form an assignment of property yet is regarded as containing or importing a covenant to do that which is necessary to effect the validity of the assignment. Upon the whole, therefore, with great respect to the learned judge, I think he has taken a wrong view and that Mrs. Martin is now entitled to the fund which has been paid into Court. It is really quite unnecessary to say that the trustees were bound to come to the Court, and in fact I think they were told to come to the Court to defend the interests of the beneficiaries. The costs in the Court below and the costs of this appeal must, therefore, be paid out of the fund.

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(1) 45 Ch. D. 51.

(2) 1 Ph. 342.

SWINFEN EADY L.J. I am of the same opinion. It appears in this case that under the will of Mrs. Mudge her residuary property was given between her four daughters and her son William. Williamina was one of the daughters, and Williamina's share was settled by the will. The income was directed to be paid to Williamina for her life and after her death to her children who should attain twenty-one or marry in such manner as she should appoint. Then comes this clause, "And if she shall die without issue who shall live to attain a vested interest her share to go to her next of kin as if she had not been married." That event ultimately happened. Williamina died without issue, and, therefore, the persons there designated as her next of kin as if she had not been married ultimately became entitled to the share under the will. The lady who thus became entitled was her sister Mrs. Martin, who had married Mr. Martin and covenanted to settle her property in 1866. At that time Mrs. Martin, her mother being then dead, would, if she survived her sister Williamina and that sister died without issue living to attain a vested interest, become the next of kin, or one of the next of kin, of her sister Williamina, and as such entitled to all or part, as the case might be, of Williamina's share. That being her interest or expectancy it is not in terms mentioned in the settlement, but the settlement contains a provision that if Mrs. Martin then was or if during the said intended coverture she should become "seised or possessed of or entitled to any real or personal property of the value of 50*l.* and upwards for any estate or interest whatsoever in possession, reversion, remainder or expectancy," then that property was to be settled.

The first point made by the respondents was that this was an interest in personal property and was settled by the settlement; that it was an interest as distinguished from a mere hope of succeeding—a mere spes successionis. I think the authorities to which the Master of the Rolls has referred make it too late now to raise such a question. It may be that technically it is not quite in the same position as a spes successionis, because if there were a failure of issue and the lady were to survive her sister she must ultimately become entitled to all or part of that sister's share, which was of a definite amount. The answer to the argument is that it is concluded by a long series of authorities that where a gift is made in terms of reference to the next of kin of a person it must be treated in the same light as if it were technically a spes successionis. The authorities, and particularly the case of *In re Parsons* (1), where Kay J. went through all the previous cases, really conclude the question.

Then there is the further point as to whether this was an interest in "expectancy" within the meaning of the covenant. The short answer to this part of the case is that the settlement is not sufficiently definite to comprise this interest. The interest is not referred to specifically in any part of the settlement, and without throwing any doubt upon the well-established rule that a mere expectancy is assignable in equity for value, on the construction of this instrument I think it is not sufficiently definitely referred to so as to be included within it. There was no change in this case during the coverture, and this decision throws no doubt at all on the efficacy of the ordinary covenant to settle after-acquired property where, during the coverture, further property is acquired and can be definitely ascertained

(1) 45 Ch. D. 51.

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as coming within the language of the covenant. In the leading cases of *Meek* v. *Kettlewell* (1) and *In re Ellenborough* (2) the expectancy was specifically described and the only reason why the covenants were not enforced was that the assignment was voluntary. In this case it was for value. The true answer to the respondents' argument on this part of the case is that the interest is not sufficiently defined by the settlement to be caught by its provisions. For these reasons I agree that the appeal should be allowed.

PHILLIMORE L.J. I agree. Although it is the law that by apt words such an expectancy as the chance of succeeding to a dead man's estate by reason of his dying intestate may be assigned, yet the cases have established that any one of the ordinary forms of covenant to settle after-acquired property in a marriage settlement does not catch such a spes successionis where there has been no accruer during the coverture. The cases have further established that although the chance of being one of the statutory next of kin under limitations in default of other interests is more hopeful than a mere spes successionis, still it is to be treated as a spes successionis; and the cases have gone further still and have said that if there is a limitation to an artificial class of next of kin, such as the persons who would be entitled as the statutory next of kin if the wife died unmarried, the same principle applies. I am of opinion that in the absence of the necessary special words in this covenant this interest has not been caught. It has been contended that it is caught by the word "expectancy," but with regard to this second point I have nothing to add to what the other members of the Court have said.

Solicitors: *J. Child; Coote & Richards.*

(1) 1 Ph. 342.

(2) [1903] 1 Ch. 697.

G. A. S.

In re FARRER AND GILBERT'S CONTRACT.

SARGANT J.

1913

Oct. 24.

[1913 F. 886.]

Vendor and Purchaser—Improvement Charge—By whom to be borne—London County Council (Improvements) Act, 1899 (62 *&* 63 *Vict. c. cclxvi.*), *s.* 61.

An improvement rent-charge imposed on land within the improvement area under the London County Council (Improvements) Act, 1899, s. 61, is not an effective charge on the land until after a resolution of the Council approving the assessment notwithstanding that the improvement itself has been completed at an earlier date. If, therefore, the land is contracted to be sold free from incumbrances after the completion of the improvement but before the date of such resolution, the purchaser is not entitled to a conveyance of the land free from the improvement rent-charge.

Stock v. *Meakin* [1900] 1 Ch. 683, distinguished.

ADJOURNED SUMMONS.

By a contract dated September 27, 1912, the vendor agreed to sell and the purchaser to buy a piece of land situate on the east side of Kingsway and on the south side of Great Queen Street in the county of London free from incumbrances at the price of 22,000*l.*, the purchase to be completed on September 27, 1915, and the contract contained a special provision enabling the purchaser to take possession at an earlier date as tenant at will to the vendor.

The property was within the "improvement area" as defined by the London County Council (Improvements) Act, 1899, s. 61 (1), and on February 20, 1900, a notice had been served by the Council on the predecessor in title of the vendor, pursuant to sub-s. 3 of that section.

The certificate of the County Council of the completion of the improvement pursuant to sub-s. 4 was issued on May 10, 1910.

The purchaser accepted the title on January 21, 1913, and thereupon entered into possession under the terms of the contract as tenant at will to the vendor.

At a meeting of the Council held on April 15, 1913, the Council by resolution approved the assessment on the land comprised in

(1) See note on p. 129, post.

the contract of an annual improvement rent-charge of 30*l.*, and on April 21 gave notice thereof to the vendor and purchaser. Prior to that date neither party had any actual knowledge that the land was or might become subject to any improvement charge.

This was a summons taken out by the purchaser under the Vendor and Purchaser Act, 1874, for a declaration that he was entitled to a conveyance of the land comprised in the contract free from the annual improvement charge of 30*l.*; and the arguments proceeded on the footing that the question depended on whether the charge became a charge on the land before or after September 27, 1912, the date of the contract for sale.

Errington, for the purchaser. The charge became a charge before the date of the contract and must be borne by the vendor. The material sections of the Act are ss. 4, 31, and 61. Notice pursuant to sub-s. 3 of s. 61 was duly given to the predecessor in title of the vendor, and the charge must be taken to have become a charge on this land at the date when the certificate of the completion of the improvement was issued by the Council pursuant to sub-s. 4 of s. 61: see *Stock* v. *Meakin* (1), a decision under the Private Street Works Act, 1892, where Vaughan Williams L.J. as one of the reasons for the judgment says, "to make the charge commence with the completion of the works is to make it coincide with the benefit."

Romer, K.C., and *Bryan Farrer*, for the vendor. The purchaser is not entitled to a conveyance free from this charge, though the vendor is willing to discharge the payments down to completion. The charge in the present case did not become effective till April, 1913, long after the date of the contract. The provisions of this Act are very special, and adjoining property might be deteriorated as well as benefited, and sub-s. 10 takes that into account. The provisions of sub-s. 4 and following sub-sections shew that the amount proposed in the assessment is not in itself final, but is subject to be reduced, altered, and modified. Sub-s. 16 is the first imposition of a charge "if no objection" is made, and it is only then that the Council are directed to

(1) [1900] 1 Ch. 683, 693.

register the charge. If the charge were effective at an earlier date, such as the date of the completion of the improvement, the provision for registration at a later date would be a deception. *Stock* v. *Meakin* (1), where the Act in question incorporated the provisions of the Public Health Act, 1875, is distinguishable.

Errington in reply.

Sargant J. This is an originating summons under the Vendor and Purchaser Act, 1874, raising the question whether under a certain agreement for the purchase of land a charge imposed under the very special provisions of the London County Council (Improvements) Act, 1899, is to be borne by the vendor or by the purchaser. The property in question is a considerable area of land on the east side of Kingsway and the south side of Great Queen Street, and by the terms of the contract the purchase was not to be completed till a long time afterwards, and there was also a special provision enabling the purchaser to take possession at an earlier date, but nothing turns on that special provision. To determine the main question I must refer shortly to the provisions of s. 61, the material section of the Act, but I will first state the dates. Admittedly there must at some time in the year 1899 have been served on the predecessor in title of the vendor a notice under sub-s. 3 of s. 61. The improvement was completed within the meaning of s. 61 on May 10, 1910. The contract is dated September 27, 1912, and it was only on April 21, 1913, that notice was given to the parties of the amount defined by the assessment as the charge under sub-s. 16 under which a rent-charge of 30*l.* per annum was imposed on the property. Both parties agree that the point which I have to determine turns entirely on the date on which this charge became a charge on the property. If it became a charge before September 27, 1912, it must be borne by the vendor; if it became a charge after that date then by the purchaser. In order to determine the date when the charge became a charge on the property I must examine the provisions of s. 61. The object of that section was to provide that a great public improvement which was being made by the London County

(1) [1900] 1 Ch. 683.

Council should to some extent at all events be paid for by the owners of the adjoining property, so far as that property should be benefited by the improvement, and accordingly sub-s. 1 constitutes an "improvement area" lying along the route of Kingsway, and extending to some distance on each side of it. [His Lordship here read the provisions of sub-ss. 2 and 3, and continued:] It is clear that the County Council is not bound to give notice to all owners, lessees, and occupiers within the improvement area. They may select those whom they wish to include in the "specification," and the sub-section provides for the giving of notice to them. Under sub-s. 4 the Council must frame an assessment describing the lands which ought to bear the improvement charge; and by sub-ss. 5 and 6 the Council may by resolution approve the assessment, and must publish notice of the resolution. Sub-s. 8 provides for objections to the assessment. Sub-s. 11 provides for the publication of notice and enacts that as from the date of such notice the assessment shall become final. Sub-s. 16 provides that if no objection be made to the assessment the amount shall be a charge and shall be registered as a land charge. Sub-s. 17 provides that the charge in the case of an award shall begin to be payable on the 1st day of April or the 1st day of October next ensuing after the date of the award. Reading all these provisions together, it appears perfectly clear that nothing in the nature of a charge is imposed on any land till the amount defined by the assessment as the charge becomes a charge under sub-s. 16, in this case in April, 1913. The section provides for a liability to a charge which gradually becomes more and more fixed, till at last a particular charge is fixed on a part of the land within the improvement area.

It is further to be noted that the amount of the charge does not represent any proportion of any fixed sum, as is the case with charges under the Public Health Acts, but it is an entirely novel creation, representing not expenditure incurred, but the individual benefit accruing in each case to the individual owner of particular land by reason of the execution of the particular improvement, to the extent of one half of the enhanced value. Moreover the conclusion to which I have come is

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strengthened by noting the clear words of futurity and contingency used until the final assessment, and also by the consideration that it would hardly have been provided that the registration of the charge under the Land Charges Registration and Searches Act, 1888, should be postponed to the date of the assessment if the charge were intended to be imposed on the land and had become effective a considerable time before. In that state of circumstances, therefore, *Stock* v. *Meakin* (1) is not of any real assistance to me here, since in that case there was in precise words a charge as from an earlier date created by the Public Health Act, 1875, and incorporated, as the Court held, in the Act in question in that case. Though I quite recognize that Vaughan Williams L.J. referred to general considerations, I think it was only for the purpose of assisting the construction he placed on expressed or implied words in the statute which he was interpreting, and not for the purpose of creating a charge by virtue of those considerations alone. In the present case there may be considerable hardship on the purchaser, but I have only to decide the bare legal point whether the land at the date of the contract was subject to a charge or to a mere potential liability to a charge. The latter in my opinion is the true view, and I therefore hold that the purchaser is not entitled to a conveyance free from the rent-charge.

Solicitors: *Tackley & Fall; Farrer & Co.*

NOTE.—The London County Council (Improvements) Act, 1899:

Sect. 4 provided for certain improvements including a new street (Holborn to Strand).

Sect. 31: "When and as each of the improvements is completed a certificate thereof shall be issued under the seal of the Council and any copy of such certificate certified under the hand of the clerk of the Council shall in all proceedings and for all purposes be admissible and received as evidence that such certificate has been duly made and from the date of such certificate so much of the improvement to which it relates as shall have been laid out for carriageway or footway shall form part of the street and may be used by the public accordingly . . . ."

Sect. 61: "And whereas the new street (Holborn to Strand) by this Act authorised will or may substantially and permanently increase in value lands in the neighbourhood of that improvement which will not be acquired for the purpose thereof and it is reasonable that provision should be made under which in respect or in consideration of such increased value a charge should be placed on such lands Therefore the following provisions shall have effect viz. :—

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(1) [1900] 1 Ch. 683.

"(1.) In and for the purposes of this Part of this Act—

"The expression—

"'The improvement area' means the area of lands" [as therein defined];

"'The improvement' means the new street (Holborn to Strand) by this Act authorised;

. . . . .

"(2.) All lands within the improvement area but which shall not be purchased and taken by the Council under the powers of this Act shall be liable to have an improvement charge placed on such lands or some of them (in accordance with the provisions herein-after set forth) in respect or in consideration of any substantial and permanent increase in value which it is clearly shown has been derived from the improvement:

"(3.) Two months at least before the Council commence any part of the improvement and as soon after the passing of this Act as the Council think fit the Council shall make under their seal a specification of all the lands within the improvement area upon which they propose to place a charge and which they desire to include in the assessment hereafter mentioned:

"They shall give notice by registered letter addressed to each owner lessee or occupier of any such lands as the Council include in such specification:

"Thereupon any such owner lessee or occupier may apply to the Local Government Board to appoint some independent person to make a valuation of the several lands within the improvement area which the Council have included in the specification:"

[The sub-section goes on to provide for making a valuation therein referred to as "the initial valuation."]

"(4.) The Council shall not sooner than twelve months nor later than three years after the issue by them of their certificate of the completion of the improvement cause to be framed an assessment describing the lands situate within the improvement area and comprised in the said valuation which the Council allege ought to bear and pay the said improvement charge and the Council shall in such assessment state and specify—

"(a) The names of the owners lessees and occupiers of the lands described in the said assessment respectively so far as they can be ascertained;

"(b) The amounts by way of charge which the Council allege ought to be charged upon such lands respectively:

"The assessment shall contain a statement of the amount which the Council allege is the enhanced market value derived by the lands respectively from the improvement:

"The amount to be proposed in the assessment as the charge to be placed on any lands under the provisions of this section shall be equal to three per centum per annum upon one half of the amount which the Council allege is the enhanced market value derived by the said lands from the improvement after making all fair and proper deductions for rates taxes assessments and impositions on the said lands according to such increased value:

"(5.) The assessment shall be submitted to and considered by the Council at a meeting or meetings and the Council may by resolution approve the same either with or without modification or addition as they think fit:

"(6.) The resolution approving an assessment shall be published once in each of two successive weeks in two or more London daily newspapers with an interval of at least six clear days between the two publications and copies of such resolution shall be publicly posted on the site of the improvement and within seven days of the date of the first publication of the resolution copies thereof shall also be served on the owners lessees and occupiers of the lands described in the assessment:

"The notices served on the owners lessees and occupiers under this section shall state shortly the effect of the resolution and assessment upon the lands in respect of which they are served and also of the provisions of this Part of this Act with respect to the time and mode of objecting to the assessment and the grounds on which the assessment may be objected to and shall also state shortly the provisions of this Part of this Act with respect to claims for decrease in value the right to have the matter decided by an arbitrator and the payment of costs:

"(7.) From and after the date of the first publication of the resolution and until the expiration of three months from the date of the last publication thereof the assessment or copies thereof certified by the clerk or some other officer of the Council shall be kept deposited at the office of the Council and shall be open to inspection at all reasonable times by any person interested:

"(8.) During the said period of three months the owner or lessee of any lands described in the assessment or the occupier thereof for the time being may by written notice served on the Council object to the assessment on any of the grounds following:—

"(i.) That any lands in which he is interested included in the assessment ought to be excluded by reason that it has not been or cannot be clearly shown that the market value of the lands to which the notice relates is substantially and permanently increased by the improvement;

"(ii.) That the amount of any charge proposed to be placed upon any lands in which he is interested ought to be varied;

"(iii.) That the assessment is incorrect in respect of some matter of fact (to be specified in the objection):

"(9.) If (a) any owner or owners of any lands comprised in the initial valuation upon which a charge is proposed to be placed who alone or together have power to sell the fee simple of such lands subject to any lease or leases thereof or (b) any lessee or lessees of any such lands for a term having not less than twenty-one years unexpired at the date of the initial valuation are of opinion that such charge is greater than it should be in reference to the enhancement or supposed enhancement of the value of such lands by reason of the improvement they may at any time within the said period of three months (instead of giving any notice of objection under the preceding paragraph of this section) by notice in writing served upon the Council require the Council to purchase their estate and interest in such lands and the Council shall thereupon purchase and take the same accordingly at the value specified in the initial valuation:" [The sub-section goes on to provide that the Council may abandon an improvement charge after notice given by owners or lessees to purchase.]

"(10.) At any time during the said period of three months after the last publication of the assessment the owner or lessee of any lands upon which a charge under this section is proposed to be placed who may be the owner or lessee of other lands within the limits of the improvement area may give written notice to the Council that substantial and permanent decrease in the value of such other lands to an amount to be stated in the notice has been caused by the improvement and that he claims that such alleged decrease shall be considered by the arbitrator and if it be clearly shown that any substantial and permanent decrease in the value of such other lands as aforesaid has been caused by the improvement the arbitrator shall deduct the same in determining the amount of the charge in respect of such first-mentioned lands:

"For the purposes of this Part of this Act joint tenants or tenants in common may give any such notice as aforesaid through one of their number authorised in writing under the hands of the majority of such joint tenants or tenants in common and any lessees may combine in a notice:

"(11.) If at the expiration of the said period of three months no notice of objection or of alleged decrease in value shall have been served on the Council then the Council may publish notice to that effect in the London Gazette and as from the date of such notice such assessment shall become final:

"(12.) If any such notice of objection or of alleged decrease in value be served on the Council within the said period of three months then the Council may apply to the Local Government Board to appoint an arbitrator for the purposes of this Part of this Act and the Local Government Board shall appoint an arbitrator accordingly and as often as any such arbitrator shall die or resign or become incapable of acting (previous to the making of an award as herein-after provided) the Council may in like manner apply to the said Board and the said Board shall from time to time appoint another arbitrator in his stead and every such arbitrator shall be entitled to such fees or remuneration as may be fixed by the Local Government Board:

"(13.) The Council may at any time before the appointment of the arbitrator but subject to the provisions of this Part of this Act by resolution amend the assessment so as to include in the assessment as amended any lands by this Act made liable to have an improvement charge placed upon them and comprised in the initial valuation but not in the original assessment and may fix the sums proposed to be charged upon any such lands but any such resolution shall be published and copies thereof shall be served and copies of the amended assessment deposited for public inspection in the manner herein-before prescribed with respect to the original resolution and assessment and notices of objection and of alleged decrease in value in respect of the amended assessment may be given in like manner and if given shall be dealt with and determined in like manner as objections to or claims in respect of the original assessment:"

(14.) [provides for the procedure of the arbitrator.]

"(15.) When and so soon as the assessment and any amendments thereof and all objections thereto and all such allegations as aforesaid (if any) shall have been disposed of as by this Part of this Act directed the arbitrator shall issue an award under his hand which shall be final and conclusive for all purposes:

"A copy of the award shall be published once in the London Gazette and notice of such award shall be served upon the owners or reputed owners lessees or reputed lessees and occupiers of the lands affected thereby:

"(16.) If no objection as herein-before provided be made to the assessment the amount defined by the assessment or the amended assessment (and if an award be made as herein-before provided then the amount defined by the award) as the charge in respect of any lands shall be a charge and incumbrance thereon and the Council shall cause the same to be registered as a land charge under the Land Charges Registration and Searches Act 1888:

"(17.) The charge in respect of any lands as fixed by the award shall (subject to the following provision) begin to be payable on the first day of April or October as the case may be next ensuing after the date of the award and shall be payable thereafter half-yearly until redeemed and satisfied:

"The arbitrator in making the award shall take into consideration all the circumstances of the case and in particular shall consider the several interests in such lands and the time at which they severally expire and may make the commencement of any charge dependent on the expiration of any term of years or other period or on the happening of any event as he shall deem fair and equitable:

"The improvement charge charged upon any lands shall be apportioned between the several parties having any estate or interest in such lands as they shall agree or as in the event of no agreement being made or so far as any such agreement shall not extend shall be

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determined by the arbitrator who may apportion the incidence of such charge as between the freehold and any other estate or interest in the lands during the period of any existing term of years for which the same is held at the date of the award:

"(18.) The charge due in respect of any lands shall be payable to the Council on demand and may be collected on behalf of the Council by such persons as they may appoint for that purpose . . . ."

A. C.

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Followed. In re DAVIDSON DECD. [1949] Ch. 671

In re GREEN.

BATH *v.* CANNON.

[1913 G. 1422.]

Will—Construction—Gift to Nephews—Exclusion of Nephews of Husband of Testatrix.

A testatrix appointed "my nephews" A. B., R. H. L., and W. H. H. to be the executors and trustees of her will, and gave all her residuary estate to them upon trust for division "between my nephews and nieces living at the date of my decease" and the children then living of her nephews and nieces who had predeceased her.

A. B. was a son of a brother of the testatrix. R. H. L. and W. H. H. were nephews of her first husband:—

Held, that only the testatrix's own nephews and nieces and the children of such of them as had predeceased the testatrix took under the gift of residue.

EMMA GREEN, a widow, who died in November, 1912, by her will revoked all her former testamentary dispositions, and proceeded as follows: "I appoint my nephews Albert Bath, of Vine Court, Sevenoaks, Kent, gentleman, Richard Haines Little, of 193, Chapeltown Road, Newton Park, Leeds, Yorkshire, bank clerk, and William Henry Haines, of Crouch Farm, St. Mary Cray, Kent, farmer (hereinafter called 'my trustees'), to be the executors and trustees of this my will." She then devised and bequeathed all her real and personal property to her trustees upon trust that they should sell the same and out of the proceeds of sale should pay her funeral and testamentary expenses and debts, and should "divide the residue thereof equally between my nephews and nieces living at the date of my decease and the children then living of my nephews and nieces who shall have

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predeceased me, to be equally divided between them, such children, if more than one, of each or any such deceased nephew or niece taking equally between them the share only to which their parent would have been entitled if living at my decease."

Albert Bath was a nephew of the testatrix, being a son of her brother Josiah Bath. Richard Haines Little and William Henry Haines were nephews of Richard Haines, the first husband of the testatrix.

Albert Bath took out an originating summons against Amelia Cannon (a daughter of Josiah Bath), Magnus William Little (a nephew of the first husband of the testatrix), and Richard Haines Little, for the determination of the question whether, on the true construction of the gift of residue, the words "nephews and nieces" included (*a*) nephews and nieces of the testatrix only, or (*b*) nephews and nieces of the testatrix and also nephews and nieces of her first husband, or (*c*) nephews and nieces of the testatrix together with Richard Haines Little and the children of William Henry Haines (who had predeceased the testatrix).

W. H. Draper, for the plaintiff, stated the facts and the questions involved.

R. L. Ramsbotham, for the niece of the testatrix. Nephews and nieces by consanguinity only take under the will. "A gift to 'nephews' or 'nieces' does not include great-nephews or great-nieces . . . . Nor does the word 'nephew' or 'niece' include a nephew or niece by marriage, i.e. a nephew or niece of the wife or husband of the testator": Hawkins on Wills, 1st ed. p. 85. For this proposition the learned author cites *Smith* v. *Lidiard.* (1) Then he says "And the fact of a great-nephew or great-niece, or nephew or niece by marriage, being erroneously described in one part of the will as a nephew or niece, does not entitle such person to share in a gift to nephews or nieces in another part of the will." In support of this he cites *Smith* v. *Lidiard* (1) and *Thompson* v. *Robinson.* (2) *Wells* v. *Wells* (3) and *Merrill* v. *Morton* (4) are also authorities in support of the second

(1) (1857) 3 K. & J. 252.
(2) (1859) 27 Beav. 486.
(3) (1874) L. R. 18 Eq. 504.
(4) (1881) 17 Ch. D. 382.

proposition. A doubt was expressed by A. L. Smith L.J. in *In re Gue* (1) whether *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3) were not overruled by *In re Jodrell.* (4) But the decision in that case turned on the particular will before the Court. [He also referred to *In re Cozens.* (5)]

R. H. Hodge, for nephews and nieces of the testatrix's first husband. The nephews and nieces of both the testatrix and her first husband are entitled under the gift. "If you find that" a certain nomenclature "is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law . . . . requires": *Hill* v. *Crook.* (6) There is a testamentary dictionary constituted here by three persons, one a nephew and the others a husband's nephews, being described by one denomination. It is not a loose construction to call a husband's nephew a nephew. Since *Smith* v. *Lidiard* (2) was decided the cases have advanced in intelligence, and I rely on *In re Jodrell* (4) as having overruled that case and *Wells* v. *Wells.* (3) In *In re Jodrell* (7) Lord Halsbury says "I do not know that the law affords any presumption whether a testator intends to benefit those who are related to himself in the strict sense, or related to his wife." The observations of Bowen L.J. (8) and of Lord Herschell (9) are also in my favour.

The contention which will be put forward in favour of the named nephews of the testatrix's husband is contrary to the decision in *James* v. *Smith.* (10) [He also referred to *Shelley* v. *Bryer.* (11)]

D. M. Kerly, for Richard Haines Little. The two nephews of the first husband, who were appointed executors under the name of "nephews," take with the nephews and nieces of the testatrix to the exclusion of the other nephews and nieces. Although *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3) have not been expressly overruled, they cannot be treated as law after *In re Jodrell* (1), for the reasoning which led to the decisions in the two earlier cases led also to the decision in *In re Jodrell.* (1)

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(1) [1892] W. N. 132.

(2) 3 K. & J. 252.

(3) L. R. 18 Eq. 504.

(4) (1890) 44 Ch. D. 590, affirmed sub nom. *Seale-Hayne* v. *Joddrell* [1891] A. C. 304.

(5) [1903] 1 Ch. 138.

(6) (1873) L. R. 6 H. L. 265, 285.

(7) 44 Ch. D. 605.

(8) 44 Ch. D. 613.

(9) [1891] A. C. 305.

(10) (1844) 14 Sim. 214.

(11) (1821) Jac. 207.

[SARGANT J. referred to *Grant* v. *Grant* (2) and *In re Birks* (3), but said that the former case must be taken to have been overruled.]

SARGANT J. This is a short point, but one of some difficulty. The testatrix by her will appointed her nephews Albert Bath, Richard Haines Little, and William Henry Haines executors and trustees thereof, and devised and bequeathed all her property to them upon trust for conversion and, after payment of her funeral and testamentary expenses and debts, upon trust to divide the residue thereof equally between her nephews and nieces living at the date of her death and the children then living of her nephews and nieces who should have predeceased her, to be equally divided between them. The question is whether the gift of residue between her nephews and nieces includes nephews and nieces of the testatrix's first husband. It is quite clear that, apart from the words appointing the three executors and trustees, the residuary gift would be only to the nephews and nieces in the ordinary sense, that is to say, to the children of the brothers and sisters of the testatrix, and would not extend to nephews and nieces of her husband. But it is a fact that of the three persons appointed executors and trustees two, namely, Little and Haines, were nephews not of the testatrix but of her first husband. It is argued, therefore, that as the word "nephews" is used by the testatrix in a less accurate sense in the earlier part of the will, the words "nephews and nieces" in the gift of residue must be given a similarly inaccurate meaning so as to include nephews and nieces of the first husband as well as her own. It is also urged as an alternative by counsel representing the secondly and thirdly named trustees that, even if all the nephews and nieces of the testatrix's husband cannot be included, at least these two trustees should be included as being expressly described as nephews.

There is a good deal of authority on the point, and the cases of

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(1) 44 Ch. D. 590.

(2) (1870) L. R. 5 C. P. 380, 727.

(3) [1900] 1 Ch. 417.

Smith v. *Lidiard* (1) and *Wells* v. *Wells* (2) would be conclusive against the larger construction if I were bound by them as authorities. But I have been referred to *In re Jodrell* (3), which is said to amount to a negation of all authority in a case like this, and I take it that I am cast at large as regards the interpretation to be put on the words used and am not bound by any reported decision, although I think I may derive assistance from the authorities cited to me.

Although a testator by using words in a particular sense may create his own dictionary, I am not prepared to say that the single use of a word inaccurately in one passage means that that word is used equally inaccurately when it occurs again later on. In the earlier part of the will the use of the word "nephew" is only partly inaccurate, since the first-named of the three trustees was the testatrix's own nephew, and it may be that this weakens the case for considering that the word was misused again in the later part of the will. On the other hand there is some ground for saying that the coupling of the nephew by blood with the nephews by affinity strengthens the argument for holding that the testatrix intended to comprehend in the same language her own relatives and her relatives by affinity. On the whole I do not think there is here quite enough in the earlier misuse of the word to lead me to attribute the same extended meaning to words otherwise clear in themselves.

That disposes of the question as between the nephews and nieces of the testatrix in the ordinary sense and the extended class of nephews and nieces, but counsel representing Richard Haines Little and the children of William Henry Haines contends that they at any rate must be included in the gift because both Little and Haines have in terms been called nephews.

Wood V.-C. in *Smith* v. *Lidiard* (1) found it a more difficult question to decide whether persons who in a previous part of the will were named and described as nieces, but who were only nieces of the husband of the testatrix, should be excluded from the residuary gift to "nephews and nieces." But he did so exclude them, as did Malins V.-C. in *Merrill* v. *Morton* (4), although he did

(1) 3 K. & J. 252.
(2) L. R. 18 Eq. 504.
(3) 44 Ch. D. 590.
(4) 17 Ch. D. 382.

so, it is true, because he felt bound to do so on the authorities. However, I feel unable even here to admit these two persons. It would be a greater anomaly to include them and then to stop short than it would be to admit all nephews and nieces. If I unlocked the first door and admitted the two, I must unlock the second door and admit all.

The case is to a great extent one of first impression. Looking at the words and with the assistance of *Smith* v. *Lidiard* (1) and *Wells* v. *Wells* (2), I hold that only nephews and nieces in the strict sense take under the residuary gift.

Solicitor for all parties: *R. H. Bentley, for Thomas G. Baynes, Dartford.*

F. E.

In re REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED.

ASTBURY J.
1913
Nov 11, 12, 13, 14, 18, 19; Dec. 2.

[00158 of 1912.]

International Law — Diplomatic Agent — Privilege — Waiver — Diplomatic Privileges Act, 1708 (7 *Anne, c.* 12).

Company—Auditors—Duties—Legal Knowledge—Balance-Sheet—Ultra vires Payments.

Both under the common law and under the Diplomatic Privileges Act, 1708, a diplomatic agent accredited to the Crown by a foreign State is absolutely privileged from being sued in the English Courts and any writ issued against him is absolutely null and void.

This diplomatic privilege can be waived, if at all, only with full knowledge of the party's rights, and (*semble*) with the sanction of his Sovereign or (if he is of inferior rank to a minister plenipotentiary) his official superior.

Except in cases like *Taylor* v. *Best* (1854) 14 C. B. 487, where the agent is merely joined as a formal defendant, it is doubtful if any such waiver is possible.

Barbuit's Case (1737) Cas. t. Tal. 281; *Triquet* v. *Bath* (1764) 3 Burr. 1478; *Hopkins* v. *De Robeck* (1789) 3 T. R. 79; *Fisher* v. *Begrez* (1833) 2 Cr. & M. 240; *Taylor* v. *Best* 14 C. B. 487; *Magdalena Steam Navigation Co.* v. *Martin* (1859) 2 E. & E. 94; *Musurus Bey* v. *Gadban* [1894] 1 Q. B. 533; 2 Q. B. 352; *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149; and *The Jassy* [1906] P. 270, discussed and explained.

Company auditors are bound to know or make themselves acquainted with their duties under the company's articles and under the Companies Acts for the time being in force, and if the audited balance-sheets do not shew the true financial condition of the company, and damage is thereby occasioned, the onus is on the auditors to shew that this damage is not the result of any breach of duty on their part.

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(1) 3 K. & J. 252.

(2) L. R. 18 Eq. 504.

Auditors are prima facie responsible for ultra vires payments made on the faith of their balance-sheet, but whether and to what extent they are responsible for not discovering and calling attention to the illegality of payments made prior to the audit must depend on the special circumstances of each case.

The payment of a commission for placing shares was authorized by the company's memorandum and a board resolution.

In reliance on the memorandum and resolution the auditors passed certain payments for commission in their balance-sheet without discovering and drawing attention to the fact that they were not authorized by Table A (1906), by which in default of articles the company was regulated:—

Held, in the special circumstances, that the auditors were not liable for this omission.

A solicitor who became a director three months after the incorporation of the company was subsequently paid certain sums for agreed costs of incorporation and other sums for costs, rent of office, and clerical assistance. These payments were confirmed as such by boards of which the solicitor was a member.

The auditors passed these payments in their balance-sheet without discovering, appreciating, and drawing attention to the fact that as there was no power under Table A (1906) for a director to contract with the company, the solicitor could not charge profit costs, so that the payments to him were pro tanto unauthorized.

Held, in the special circumstances, that the auditors were not liable.

Principles stated in *Spackman* v. *Evans* (1868) L. R. 3 H. L. 171; *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887) 36 Ch. D. 787; *In re London and General Bank* (No. 2) [1895] 2 Ch. 673; *In re Kingston Cotton Mill Co.* (No. 2) [1896] 2 Ch. 279 (as to company auditors); and in *Thomas* v. *Devonport Corporation* [1900] 1 Q. B. 16 (as to public auditors), discussed and applied.

MISFEASANCE SUMMONS.

On May 7, 1912, the liquidator of the above company issued this summons against the directors T. H. Myring, R. E. Lembcke, and Paul E. Vanderpump (since deceased), and the auditors Woodington and Bubb, claiming damages for various acts of misfeasance.

On the hearing of the summons R. E. Lembcke took the preliminary objection that as a second secretary of the Peruvian Legation he was entitled to diplomatic privilege.

The liquidator admitted that R. E. Lembcke was entitled to diplomatic privilege, but contended that he had waived it.

The facts relating to this point were as follows. On May 15, 1912, R. E. Lembcke entered an unconditional appearance to the summons, and on October 14, 1912, he issued a summons for further time to file evidence. On October 31, 1912, he swore an affidavit on the merits, stating his official position, but not raising any objection to the jurisdiction. On June 10, 1913, the case was mentioned in Court on an application by the liquidator to fix a time for hearing, and R. E. Lembcke's counsel then stated that he should insist on his diplomatic privilege. The objection was taken with the sanction and at the wish of the Peruvian Legation.

The preliminary point was argued and decided before the rest of the summons was opened.

Felix Cassel, K.C., and *Owen Thompson*, for R. E. Lembcke. Under the Diplomatic Privileges Act, 1708, s. 3, which section is merely declaratory of the common law, the summons, as against R. E. Lembcke, is "utterly null and void, to all intents, constructions, and purposes whatsoever": *Barbuit's Case* (1); *Triquet* v. *Bath* (2); *Hopkins* v. *De Robeck* (3); *Magdalena Steam Navigation Co.* v. *Martin* (4); *Parkinson* v. *Potter* (5); *Musurus Bey* v. *Gadban.* (6) It cannot therefore be set right by waiver of the privilege: *Barbuit's Case.* (1) *Taylor* v. *Best* (7), the only case in which waiver was upheld, turned on very special circumstances. The privileged person was one of several joint contractors and was apparently joined as a necessary though formal defendant. Having appeared and allowed the action to go through several stages he was not allowed to raise his privilege so as to cause the entire action to abate. Even if the decision can possibly stand in the light of the subsequent authorities, it is far removed from the present case. R. E. Lembcke is personally sued for damages. He is not a necessary party to the action, which can quite well go on against the other defendants without him. Even if it were conceivable that a diplomatic agent can waive his privilege, which is really the privilege of his Sovereign, he can only do so intentionally, with full knowledge of his rights, and with the sanction of his Sovereign or Legation. He cannot waive his rights by inadvertence: *The Jassy.*(1) In the present case R. E. Lembcke being a foreign subject cannot be presumed to have had any knowledge of his rights or any intention to waive them, and the objection was taken at the instance of the Legation. It was taken at the earliest proper time, namely, when the matter first came before the Court: *Mighell* v. *Sultan of Johore.*(2)

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(1) Cas. t. Tal. 281.

(2) 3 Burr. 1478, 1480.

(3) 3 T. R. 79.

(4) 2 E. & E. 94.

(5) (1885) 16 Q. B. D. 152, 162.

(6) [1894] 1 Q. B. 533; 2 Q. B. 352.

(7) 14 C. B. 487.

Clauson, K.C., and *Arthur Mulligan*, for the liquidator. A writ against a diplomatic agent is not void unless it is put in force by an arrest: *English* v. *Caballero*(3); and it is possible that the right to freedom from arrest or execution cannot be waived: *Barbuit's Case.*(4) But apart from this, diplomatic privilege can be waived by a Sovereign — *The Charkieh*(5); *Mighell* v. *Sultan of Johore* (6)—or by a diplomatic agent—*Fisher* v. *Begrez*(7); *Taylor* v. *Best*(8)—and there is no authority that in the latter case the consent of the Sovereign or the Legation is required. In the present case R. E. Lembcke ought to have appeared under protest and applied in due course to set aside the summons: *Keymer* v. *Reddy.*(9) Instead of doing this he took steps to defend the action on the merits, thereby waiving his privilege. The objection on the ground of privilege was clearly an afterthought, as it was not raised till June 10, 1913. In the circumstances it should be disallowed.

Astbury J. (after stating the facts). The liquidator admits that apart from the question of waiver R. E. Lembcke is privileged, and the question I have to decide is whether the summons shall proceed against him under the special circumstances of this case.

(1) [1906] P. 270.
(2) [1894] 1 Q. B. 149, 159.
(3) (1823) 3 Dow. & Ry. 25, 27.
(4) Cas. t. Tal. 281.
(5) (1873) L. R. 4 A. & E. 59.
(6) [1894] 1 Q. B. 149.
(7) 2 Cr. & M. 240, 242.
(8) 14 C. B. 487.
(9) [1912] 1 K. B. 215.

Whether diplomatic privilege can be waived is a point of considerable difficulty. Sect. 3 of the Diplomatic Privileges Act, 1708, which section is merely declaratory of the common law, provides that "All writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other publick minister of any foreign prince or state, authorized and received as such by her majesty, her heirs or successors, or the domestick, or domestick servant of any such ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever."

The exact point, namely, whether a public minister sued individually and not as one of several joint contractors, as in *Taylor* v. *Best* (1), can waive his privilege, has not been directly determined; but in *Barbuit's Case* (2) Talbot L.C. expressed an opinion to the contrary, although the privilege was not claimed until ten years after action brought. Talbot L.C. said: "A bill was filed in this Court against the defendant in 1725 upon which he exhibited his cross bill, stiling himself merchant. On the hearing of these causes the cross bill was dismissed; and in the other, an account decreed against the defendant. The account being passed before the Master, the defendant took exceptions to the Master's report, which were overruled; and then the defendant was taken upon an attachment for non-payment, etc. And now, ten years after the commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavourable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for, the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on the account of those he represents; and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an

(1) 14 C. B. 487.

(2) Cas. t. Tal. 281.

ambassador is sent, and for sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for, by his being thrown into prison the business must inevitably suffer." This passage, though only a dictum, as Barbuit was not in fact a public minister, is of very great weight.

The question before me is whether or no *Taylor* v. *Best* (1) is an absolute decision as to the possibility of waiver. I will first refer to the earlier dicta or decisions. In *Triquet* v. *Bath* (2) Lord Mansfield said: "This privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament 7 Ann c. 12 is declaratory of it. All that is new in this Act, is the clause"—s. 4—"which gives a summary jurisdiction for the punishment of the infractors of this law." In *Hopkins* v. *De Robeck* (3) Buller J. said: "The statute of Ann is only explanatory of the law of nations; and the words 'domestic and domestic servant' are only put by way of example. The privilege was held, in the case in Burrow (2), to extend to secretaries."

In *Taylor* v. *Best* (1), relied on by the liquidator, the action was brought against Best, Drouet, Sperling, and Clarke as directors to recover 250*l*. paid as a deposit on shares. Drouet was in fact First Secretary of the Belgian Legation. Best, Drouet, and Sperling pleaded severally never indebted. Clarke suffered judgment by default. Notice of trial was given, and on December 8, 1853, Drouet obtained a rule for a special jury. Two days later he issued a summons calling upon the attorneys for the plaintiff and for the defendants Best and Sperling to shew cause why the action should not be stayed on the ground of diplomatic privilege. The plaintiff contended that the privilege had been waived. The exact facts of waiver relied on are stated in the plaintiff's argument (4), namely, "that, on the writ being issued, the plaintiff's attorney wrote to the defendant Drouet, to inquire the name of his solicitor to whom he should send the process for an undertaking to appear; that, in answer to such inquiry, he received a letter from the attorneys of M. Drouet, requesting that the writ might be sent to them for that purpose;

(1) 14 C. B. 487.

(2) 3 Burr. 1478, 1480.

(3) 3 T. R. 79, 80.

(4) 14 C. B. 498.

that an appearance was duly entered, and that, after time obtained to plead, and after issue joined, a rule for a special jury was obtained on behalf of Drouet." Jervis C.J. said (1): "There is no doubt that the defendant Drouet fills the character of a public minister to which the privilege contended for is applicable: and I think it is equally clear, that, if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 7 Anne, c. 12, s. 5, in the case of an ambassador's servant. . . . . Admitting, then, that M. Drouet is a person entitled to the privileges and immunities which the law of England accords to ambassadors from foreign friendly Courts, and that he does not forfeit them by engaging in commercial ventures,—the question is, whether he is, under all the circumstances disclosed by the affidavit before us, entitled to the privilege which he claims. Although it is admitted that no process can be available against the person or the goods of a foreign ambassador or minister, no case has been cited to shew that an application in the present form, to stay all proceedings, is available in the Courts of this country . . . . No case has been cited, of a motion to stay the proceedings, where the personal liberty of the applicant has not been interfered with. Further, I am aware of no case in which, where there are several defendants, and the action has been allowed to go on to the verge of trial, the proceedings have been stayed upon the application of one of the defendants. Such a course would be obviously unjust to the other defendants, seeing that the expense they had already incurred would thereby be rendered useless. Without, however, dwelling upon that, it seems to me that this motion must fail, upon the merits." He then continues (2): "The action is brought against four defendants,—the writ being sued out against M. Drouet and the three others as joint-contractors. No doubt, the plaintiff was bound, at the peril of a plea in abatement, to sue all. The writ being issued, nothing is done upon it which can at all interfere with the exercise by M. Drouet of his diplomatic functions, or with his personal comfort or dignity. But, knowing that a writ has issued, or having reason to believe

(1) 14 C. B. 519.

(2) 14 C. B. 521.

that it is about to issue, he causes his attorney to write to the plaintiff's attorney, desiring that the process may be sent to him for an undertaking to appear. He, therefore, voluntarily attorns and submits himself to the jurisdiction of the Court. Under these circumstances, I think he cannot be permitted now to complain that the suit has been improperly instituted against him. On the contrary, I think, that, by analogy to the doctrine cited from the learned jurists whose works have been so laboriously consulted, the action may well be maintained. It is said,—and perhaps truly said,—that an ambassador or foreign minister is privileged from suit in the Courts of the country to which he is accredited, or, at all events, from being proceeded against in a manner which may ultimately result in the coercion of his person, or the seizure of his personal effects necessary to his comfort and dignity; and that he cannot be compelled, in invitum, or against his will, to engage in any litigation in the Courts of the country to which he is sent. But all the foreign jurists hold, that, if the suit can be founded without attacking the personal liberty of the ambassador, or interfering with his dignity or personal comfort, it may proceed." It is clear that that view of the foreign jurists is not the law of this country. Jervis C.J. then refers to certain cases of proceedings in rem where the means of litigation is established without any molestation or interference with the person of the defendant, and adds (1): "Yet, if the defendant chooses to appear, for the purpose of protecting his goods and investigating the matter in dispute, he may convert that which was originally a proceeding in rem into a proceeding in personam. . . . . If, therefore, as in Holland, and in some other countries, where goods may be taken for the purpose of founding jurisdiction, the defendant may come in and convert the proceeding in rem into a proceeding in personam, and so attorn or submit himself to the jurisdiction, it seems to me that there is no distinction between that case and the present, where there has been no attempt on the part of the plaintiff to disturb the comfort or interfere with the personal liberty of the foreign minister, but where there has been the mere issuing of a writ to which he has voluntarily appeared, and thus submitted himself to the jurisdiction."—There again the same point as to the distinction between a writ of execution and an ordinary writ is indirectly referred to.—"I do not feel myself at all pressed by the argument urged by Mr. Willes, that the privilege in question, being the privilege of the Sovereign, cannot be abandoned or waived by the ambassador: for, when the authorities upon which that argument is sought to be sustained, come to be examined, they do not shew that the ambassador may not submit himself to the jurisdiction, for the purpose of having the matter in difference investigated and ascertained; but only that the sacred character of the person of the ambassador cannot be affected by any act or consent on his part; and that, by interfering with the person of the ambassador, or with the goods which are essential to the personal comfort and dignity of his position, you are in effect attacking the privilege of his master. That, however, is not the case here:"—then follows a very important passage (1)—"for anything that appears, M. Drouet is sued,—he being a joint-contractor, and so a necessary party to the action,—merely for the purpose of ascertaining the liability of the other defendants. If he had not thought fit to attorn to the jurisdiction, but had allowed judgment to go against him by default, non constat that anything would have been done upon the judgment, otherwise than by enforcing it against the other defendants. If any ca. sa. or fi. fa. were issued against him upon the judgment, the statute of Anne would have applied, and the Court might have been called upon to interfere to prevent its being put in force against him. It seems to me that M. Drouet here has courted the jurisdiction, and that we ought not to interfere." Then Maule J. says (2): "I am of opinion, that, as M. Drouet has voluntarily appeared to the action, and allowed it to go on through several stages, so that the application could not be granted without prejudice to the rights of the other defendants, as well as to those of the plaintiff, the present motion ought not to succeed." Of course that point does not apply here, as the liquidator can go on against the other defendants.

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(1) 14 C. B. 522.

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(1) 14 C. B. 523.

(2) 14 C. B. 523.

"Whether an ambassador or public minister duly accredited to the Queen,—which M. Drouet undoubtedly is,—is so far privileged as to be free from all liability to be sued in the Courts of this country, is a very grave question, and one which does not seem to have been settled by any judicial determination in our Courts, or indeed elsewhere." It is now well settled that the common law and statutory immunity apply both to the issue of an ordinary writ as well as to a writ of execution. After referring to the cases of applications on behalf of domestic servants of ambassadors, Maule J. proceeds (1): "These cases do not in any degree determine the point which has been attempted to be raised on the present occasion,—and undoubtedly it is a point which is very fit to be considered whenever it may be properly presented for decision,—viz. Whether an ambassador or public minister can be brought into Court against his will, by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined. Unquestionably it must to a certain extent interfere with the ambassador's comfort to have his rights in any way made the subject of litigation; and therefore it may well be that the privilege he enjoys is as large and extensive as Mr. Justice Blackstone affirms it to be. But it is unnecessary to determine that question upon the present occasion,"—it has since been absolutely determined—"because, whatever may be the extent of the ambassador's privilege in that respect, I think, that, where he is sued jointly with others, and appears to the process, and allows the suit to go on to an advanced stage without offering any objection, and where there does not appear to be any intention on the part of the plaintiff to interfere with either the person or the property of the ambassador, and where the action may proceed to its ultimate termination without any such molestation or interference, we should do wrong to give effect to a claim of privilege which has been so abandoned by the voluntary act of the party."

Before passing on it is necessary to observe that this is a decision of the Court of Common Pleas that in certain cases and in certain ways and to a certain extent a diplomatic

(1) 14 C. B. 524.

agent can waive his privilege, and that in the particular case before that Court Drouet was a joint contractor, treated as a necessary party, and it did not appear that the plaintiff intended to enforce any remedy against him, or that he was more than a formal defendant. Having appeared and taken steps and allowed the action to go through several stages he was not allowed subsequently to insist on his privilege so as to cause the action to abate to the prejudice of the plaintiff and his co-defendants who had incurred expense in reliance on his apparent waiver. It was under those special circumstances that the Court held the privilege had been waived.

In *Magdalena Steam Navigation Co.* v. *Martin* (1) it was held that the common law and statutory privilege extended to ordinary writs and other initial processes of action and was not confined to writs or processes of execution. Lord Campbell C.J. said (2): "The question raised by this record is, whether the public minister of a foreign State, accredited to and received by Her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued, against his will, in the Courts of this country, for a debt, neither his person nor his goods being touched by the suit, while he remains such public minister." He held that the plea to the jurisdiction was good and added (3): "He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country." The forfeiture or waiver there spoken of refers to a passage in 4 Co. Inst. 153 dealing with forfeiture by crime, which was cited in the plaintiffs' argument. (4) In the defendant's argument the following passage appears (5): "It cannot be contended that the defendant has, by appearing to the writ, precluded himself from saying

(1) 2 E. & E. 94.
(2) 2 E. & E. 111.
(3) 2 E. & E. 111.
(4) 2 E. & E. 99.
(5) 2 E. & E. 110.

that the suit is improperly brought. [Lord Campbell C.J. His plea denies that the Court has jurisdiction. Erle J. Supposing that he had made an affidavit in Court, and had moved to stay proceedings, it could not have been said that he thereby admitted the jurisdiction. Lord Campbell C.J. The plea is only another mode of doing that.]" Later on in the judgment *Taylor* v. *Best* (1) is referred to, but not on the question of waiver. Lord Campbell C.J. said (2): "Mr. Bovill, being driven from his supposition that the writ in this case might be sued out only to save the Statute of Limitations, by the fact that it had been served upon the defendant, and by the allegation in the plea that it was sued out for the purpose of prosecuting this action to judgment, strenuously maintained that at all events the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas, in *Taylor* v. *Best* (1), it is supported by no authority; the proceeding would be wholly anomalous; it violates the principle laid down by Grotius; it would produce the most serious inconvenience to the party sued; and it could hardly be of any benefit to the plaintiffs. In the first place, there is great difficulty in seeing how the writ can properly be served, for the ambassador's house is sacred, and is considered part of the territory of the Sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his Sovereign with one of her ministers. It is allowed that he would not be bound to answer interrogatories, or to obey a subpœna requiring him to be examined as a witness for the plaintiffs. But he must defend the action, which may be for a debt of 100,000*l.*, or for a libel, or to recover damages for some gross fraud imputed to him. He must retain an attorney and counsel, and subpœna witnesses in his defence. The trial may last many days, and his personal attendance may be necessary to instruct his legal advisers. Can all this take place without 'coactio' to the ambassador?

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(1) 14 C. B. 487, 493.

(2) 2 E. & E. 113.

Then, what benefit does it produce to the plaintiffs? There can be no execution upon it while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall." Towards the end of his judgment, after pointing out that the 1st and 3rd sections of the Diplomatic Privileges Act, 1708, were only declaratory of the law of nations, Lord Campbell C.J. said (1): "Some inconveniences have been pointed out as arising from this doctrine, which, we think, need not be experienced. If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by shewing that he is not liable to be sued."—That is indirectly pointed at the reasoning in *Taylor* v. *Best.* (2)—"As to the difficulty of removing an ambassador from a house of which he unlawfully keeps possession, De Wicquefort, and other writers of authority on this subject, point out that in such cases there may be a specific remedy by injunction. Those who cannot safely trust to the honour of an ambassador, in supplying him with what he wants, may refuse to deal with him without a surety, who may be sued; and the resource is always open of making a complaint to the Government by which the ambassador is accredited. Such inconveniences are trifling, compared with those which might arise were it to be held that all public ministers may be impleaded in our municipal Courts, and that judgment may be obtained against them in all actions, either ex contractu or ex delicto. It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign State is privileged from all liability to be sued here in civil actions; but we think that this follows from well established principles, and we give judgment for the defendant."

In *Musurus Bey* v. *Gadban* (3) the plaintiff as executor of the Turkish ambassador Musurus Pacha was interested in arguing that the ambassador's privilege was not absolute. In the Divisional Court Wright J. said (4): "To some extent, the point raised to-day is new. It is this: Admitting that

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(1) 2 E. & E. 115.

(2) 14 C. B. 521, 523.

(3) [1894] 1 Q. B. 533; 2 Q. B. 352.

(4) [1894] 1 Q. B. 542.

Musurus Pacha, whilst he retained his privilege, could not have been sued to judgment or execution, still it is said that a writ could have been issued against him for the purpose of avoiding the application of the Statute of Limitations, and, therefore, that the statute began to run whilst he was in England."—That refers to the issue of an ordinary writ.—"We think, on the whole, that we ought to follow the indication of opinion of Lord Campbell in *Magdalena Steam Navigation Co.* v. *Martin* (1), to the effect that the statute 7 Anne, c. 12, prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution." Several passages in the judgments of the Court of Appeal must also be referred to. A. L. Smith L.J. said (2) that the plaintiff's counsel "did not assert, for this would have been useless, that Musurus Pacha could have been effectively sued during the period he was de facto ambassador in London, for the case of *Magdalena Steam Navigation Co.* v. *Martin* (1), which has never since been doubted, settled that he could not, as during that period he was exempt from the jurisdiction of the Courts of this country." And later he said (3): "The writs and processes mentioned in the Act are not confined to such as directly touch the person or goods of an ambassador, but extend to such as in their usual consequences would have this effect as was held in the *Magdalena Steam Navigation Co. Case* (1) above cited." He then read the passage from Lord Campbell's judgment as to forfeiture or waiver to which I have already referred. Again, in dissenting from the contention that to issue a writ without serving it would have been no breach of the ambassador's privilege, and that therefore a writ might have been issued for the purpose of saving the statute, and have been renewed from time to time, Davey L.J. said (4): "It is in my opinion sufficient to refer to the 3rd section of 7 Anne, c. 12, which makes all writs and processes, whereby the person of any ambassador or other public minister may be arrested or imprisoned, or his goods and chattels may be distrained, seized, or attached, utterly null and void. It has been decided in *Magdalena Steam Navigation Co.* v. *Martin* (1) that this section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law) is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in the *Magdalena Case* (1), and that all that it was necessary to decide was that that service was bad. But the grounds upon which the decision was based in Lord Campbell's judgment go beyond that point, and in my opinion shew a total want of jurisdiction of the Court to entertain the action at all." After referring to passages in that judgment Davey L.J. proceeds (2): "These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our Courts: see, for example, the latest case of *The Parlement Belge* (3) in the Court of Appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any Sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such Sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action which action the Court has no jurisdiction to entertain, and which writ, therefore, the Court has no jurisdiction to issue, can prevent the statute running. . . . I am therefore of opinion that Gadban and Watson, or Gadban or his executors, could not have properly issued a writ against Musurus Pacha or (in other words) had no right of action against him while he was

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(1) 2 E. & E. 94.

(2) [1894] 2 Q. B. 354.

(3) [1894] 2 Q. B. 356.

(4) [1894] 2 Q. B. 360.

(1) 2 E. & E. 94.

(2) [1894] 2 Q. B. 361.

(3) (1880) 5 P. D. 197.

ambassador. The doubts suggested in *Taylor* v. *Best* (1) cannot in my opinion be supported." He is referring to the doubts on the question of absolute privilege.

In the course of his able argument Mr. Clauson referred to *Mighell* v. *Sultan of Johore.* (2) In that case the question was whether a foreign potentate had submitted to the jurisdiction by his conduct. Lord Esher M.R. read the following passage from *The Parlement Belge* (3), namely, "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any Sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such Sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." Lord Esher proceeded: "It appears to me that, by the authority of this Court, the rule was thus laid down absolutely and without any qualification. We had not then to deal with the question of a foreign Sovereign submitting to the jurisdiction; everybody knows and understands that a foreign Sovereign may do that. But the question is, How? What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the Court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he has perfectly concealed the fact that he is a Sovereign, and has acted as a private individual, yet it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shewn that he is an independent Sovereign, and does not submit to the jurisdiction, the Court has no jurisdiction over him. It follows from this that there can be no inquiry by the Court into his conduct prior to that date. The only question is whether, when the matter comes before the Court, and it is shewn that the defendant is an independent Sovereign, he then elects to submit to the jurisdiction." Lopes L.J. said (1): "In my judgment, the only mode in which a Sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ." He does not of course mean by a mere appearance, but by appearance and subsequent proceedings. Kay L.J. said (2): "The foreign Sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction."

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(1) 14 C. B. 487.

(2) [1894] 1 Q. B. 149, 159.

(3) 5 P. D. 197, 214.

There is one other dictum to which I must refer. In *Fisher* v. *Begrez* (3) an ambassador's servant was arrested for debt. He paid the money immediately upon his arrest without protest; and upon being asked by the sheriff's officer whether he intended to make any application, he said he did not, and the sheriff in due course paid over the money. Five months later the defendant obtained a rule calling on the plaintiff and the sheriff to shew cause why the ca. sa. should not be set aside and the money returned. The ambassador refused to interfere. In the course of the argument Lord Lyndhurst C.B. said: "A party may waive his privilege, and if he pays the money without insisting on his privilege, does he not thereby waive it? Besides, it is sworn that he expressly said, he should not make any application." This was properly relied on as a dictum in favour of the possibility of waiver. In his judgment Bayley B. said: "The privilege is not the privilege of the servant, but of the ambassador. This application is not made on behalf of the ambassador, or of any one connected with him; but on behalf of the defendant alone." In that case it is to be observed that the servant said he should not claim privilege, and the ambassador refused to claim it on his behalf. In other words he refused to acknowledge the servant as within the privilege. The decision does not touch the question of waiver by a privileged person.

(1) [1894] 1 Q. B. 161.

(2) [1894] 1 Q. B. 163.

(3) 2 Cr. & M. 240, 242, 243.

It seems to me that both at common law and under the statute all writs against foreign public ministers accredited to the Court of this country are absolutely null and void, and that if and so far as waiver of that diplomatic privilege is possible it must be confined to cases of some very special nature as was the case in *Taylor* v. *Best.* (1) The question is whether R. E. Lembcke's conduct brings him within that decision. I have felt considerable difficulty as to this. No doubt he entered an unconditional appearance, asked for further time to file evidence, and filed evidence on the merits stating his official position, but not raising any question of privilege. Has he thereby waived his privilege? It seems to me that on this question there are three matters to be considered. In the first place, having regard to the earlier cases as to the absolute nullity of proceedings against foreign public ministers I am satisfied that waiver, if it be possible, must be strictly proved. It implies a knowledge of the rights waived, and I am not satisfied that R. E. Lembcke when he entered appearance and took the subsequent steps was aware of his privilege. Secondly, knowledge of our common and statute law cannot be imputed to a foreign subject residing here as diplomatic agent of a foreign State. Thirdly, I am far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his Sovereign or Legation, and it is clear that, whatever knowledge R. E. Lembcke possessed, the objection on the ground of privilege is now taken with the sanction and at the instigation of the Peruvian Legation.

To some extent my view is supported by *The Jassy* (2), which was a motion to dismiss an action for damage by collision on the ground that the vessel proceeded against was the property of a foreign sovereign State and destined to its public use. On March 6, 1906, the plaintiffs issued a summons in rem addressed to the owners of the *Jassy*, and on March 18 the *Jassy* was arrested at Liverpool, but released on an undertaking to put in bail given by solicitors acting for the owners' agents. On March 22 appearance for the owners was entered, and on April 12 the owners raised the question of privilege. Gorell Barnes P. said: "The result is that the principle laid down in

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(1) 14 C. B. 487.

(2) [1906] P. 270, 273.

The Parlement Belge (1) applies, in spite of the undertaking to put in bail and appearance entered by some agent in Liverpool without the knowledge of the Roumanian Government and under a misapprehension as to the privilege enjoyed by a sovereign State in respect of the immunity of its public vessels from arrest. The action will be dismissed with costs."

There is one other matter to be considered. Whatever be the true view of R. E. Lembcke's conduct in entering appearance and taking the subsequent steps, it is clear that the summons must prove abortive against him. No judgment or execution can be enforced or levied against him, and the authorities shew the impropriety of allowing the action to go on merely for the purpose of defining his liability.

On the grounds above stated I am of opinion that there has been no effective waiver established in this case and that the plea of privilege must prevail with costs since June 10, 1913, when the objection was first taken.

Clauson, K.C. I am willing to undertake not to appeal on this preliminary point if my friend is willing to have the action against him dismissed without costs.

Owen Thompson. I accept that offer.

ASTBURY J. Very well.

The summons then proceeded against Myring and the auditors, Vanderpump's estate not being represented, but during the proceedings the case against Myring was settled for 2500*l.* payable by quarterly instalments of 500*l.* each, the first instalment being payable on February 18, 1914.

The case against the auditors was that they had passed certain payments by way of commission for placing shares, certain sums paid by way of profit costs to Paul E. Vanderpump, the company's solicitor, who was also a director, and a sum of 36*l.* 3*s.* 8*d.* paid to Myring and not accounted for, without calling attention to the illegality of these payments. These payments were also included in the case against Myring.

The facts were as follows. The company was promoted by

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(1) 5 P. D. 197.

Myring, who had received certain information as to the existence of gold in Bolivia. It was incorporated on March 22, 1907, to acquire mining property in Bolivia and with powers under its memorandum "to remunerate any parties for services rendered or to be rendered in placing or assisting to place any shares in the company's capital" and "to pay or receive commission, for or in respect of the subscribing or underwriting or guaranteeing the subscription of the shares of this or any other company." The capital was 30,000*l.* in 1*l.* shares. There were no special articles, so that the company was governed by Table A Revised (1906), which does not authorize the payment of a commission for placing shares or enable a director to contract with the company.

On March 15, 1907, the signatories to the memorandum appointed Myring and Lembcke directors under Table A, art. 68.

On March 25, 1907, the board appointed Paul E. Vanderpump solicitor to the company. He carried on business under the style of Paul E. Vanderpump & Eve, and in the minutes the firm is frequently referred to as the company's solicitors.

On May 16, 1907, an agreement was entered into between Myring and the company reciting that Myring was about to proceed to Bolivia for the purpose of taking up certain gold mining properties already prospected on his behalf and of prospecting and acquiring others. The company agreed to pay Myring his expenses and other payments made for the above purpose and to accept a statement from Myring of those expenses and payments without requiring vouchers. Myring on his part agreed to convey the mining properties to the company. The consideration for Myring's services and for the assignment of the mining properties was agreed at 20,000*l.*, namely, 5000*l.* in cash and 15,000*l.* in shares. The resolution authorizing the execution of this agreement was passed by the board, i.e., Myring and Lembcke, on the same day. Very large sums were paid to Myring under this agreement, which was filed on July 12, 1907, but he did not in fact succeed in obtaining any mining properties.

On June 13, 1907, a cheque for 100*l.* was paid to Paul E. Vanderpump & Eve for stamp duty on the contract. This was signed by Myring and Lembcke. On June 14, 1907, Paul E.

Vanderpump was appointed a director and the payment of the stamp duty cheque was confirmed by the board. On November 21, 1907, a cheque for 50*l.* was paid to Paul E. Vanderpump & Eve on account of costs of incorporation. It was signed by Myring and Paul E. Vanderpump.

On November 29, 1907, a supplemental agreement with Myring confirming the first agreement was approved and executed. This was filed on December 11, 1907. Woodington and Bubb were appointed auditors. The payment of the 50*l.* on account of costs of incorporation was confirmed. Paul E. Vanderpump reported that the 100*l.* previously paid was not required for stamp duty and had been credited to the company as paid on account of costs of incorporation. This was confirmed by the board consisting of Myring, Lembcke, and Paul E. Vanderpump.

On December 13, 1907, a cheque for 100*l.* was drawn by Paul E. Vanderpump & Eve for "Balance of costs as agreed of incorporation, duty, and fees." This was signed by Myring and Paul E. Vanderpump. This made a total of 250*l.* for costs of incorporation. On January 31, 1908, a cheque for 20*l.* on account of costs since incorporation was signed by Myring and Paul E. Vanderpump and paid to the solicitors. The drawing of these cheques was confirmed by the board, i.e., Myring, Lembcke, and Paul E. Vanderpump, on February 7, 1908, under the headings "The company's solicitors for 100*l.* balance of agreed costs of incorporation including duty, fees, etc." and "The company's solicitors 20*l.* on account of costs since incorporation."

On March 9, 1908, a cheque on account of stores was drawn in favour of the Army and Navy Stores or bearer. This was drawn by Myring and Paul E. Vanderpump and handed to Myring for the purchase of stores. The drawing of this cheque was confirmed by the board, i.e., Myring, Lembcke, and Paul E. Vanderpump, on March 18, 1908, as "Army and Navy Stores 100*l.* on account for stores and equipment for expedition." Myring, however, only expended 63*l.* 16*s.* 4*d.* of this amount at the Army and Navy Stores, and vouchers for this amount alone were forthcoming. The liquidator sought to render the auditors liable for the unvouched balance, namely, 36*l.* 3*s.* 8*d.*

The statutory report dated March 20, 1908, and made pursuant to s. 12 of the Companies Act, 1900, stated that 15,000 fully-paid shares had been allotted to Myring for services rendered and to be rendered and for the assignment or transfer of gold mining properties to the company and that 11,745*l.* had been received in respect of shares allotted for cash. Under the head of particulars of payments on capital account it stated (inter alia) :—

	£	*s.*	*d.*
Preliminary expenses of incorporation, registration, duty, fees, etc.	250	0	0
Cash consideration to Mr. Myring under contracts with company	5000	0	0
On account of equipment and passage money of expedition, machinery, stores, etc. . . .	1016	3	0
On account solicitor's costs	20	0	0

It then stated : "The following is an account of the preliminary expenses of the company :—Costs of incorporating the company, duties, fees, stamps, etc., 250*l.*" The auditors certified that so much of the report as related to the shares allotted and to the cash received in respect of such shares "and to the receipts and payments of the company on capital account is correct." The 100*l.* Army and Navy Stores cheque was included in the 1016*l.* 3*s.* This report was adopted at the statutory meeting of April 2, 1908. In the meantime, namely, on March 25, 1908, Caldwell was appointed a director, and on March 26, 1908, Myring and R. E. Lembcke left for Bolivia. On September 18, 1908, Edgar was appointed a director.

On March 16, 1908, the board, then consisting of Myring, Lembcke, and Paul E. Vanderpump, had resolved that a commission of 10 per cent. in cash be paid to Thew for introducing subscribers for shares in the company. In pursuance of this resolution a total amount of 329*l.* 10*s.* was paid to Thew on March 21 and May 8, 1908, and on April 29, 1908, a cheque for 9*l.*, being a 5 per cent. similar commission to Scott, was drawn and sanctioned by the board. Thew and Scott were not stockbrokers. The liquidator impeached the payment of these commissions. Other cheques were drawn to Paul E. Vanderpump & Eve on account of costs and for rent of office and clerical work. They were signed by Paul E. Vanderpump and another director and subsequently confirmed by a board consisting of Paul E. Vanderpump and one or at most two other directors. These payments were stated in the statutory report and balance-sheets. It was admitted that the 250*l.* for costs of incorporation included 150*l.* profit costs and that the 20*l.* and other payments for costs, rent of office, and clerical work included 50*l.* profit costs. The liquidator impeached the payment of the profit costs on the ground that Paul E. Vanderpump was a director. The first balance-sheet, made up to November 30, 1908, contained (inter alia) the following items on the assets side :—

	£	*s.*	*d.*
By Properties Account . . . . . . (Consideration paid, 15,000*l.* in fully-paid shares and 5000*l.* in cash)	20,000	0	0
Preliminary expenses for incorporation of company, duty, fees and other disbursements .	250	0	0
Commissions paid for obtaining subscriptions for shares	338	10	0
Paul E. Vanderpump & Eve—Paid on account of current law charges	65	0	0
Expedition Account: Moneys paid to Mr. Myring for purchase of stores, plant, and outfits and to be disbursed by him in Bolivia as per agreements with the company	7381	8	3

The last item included the 100*l.* cheque to the Army and Navy Stores.

The auditors certified as follows: "We have audited the balance-sheet of the Republic of Bolivia Exploration Syndicate, Limited, above set forth. We have obtained all the information and explanations we have required. In our opinion such balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, according to

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the best of our information and the explanations given us, and as shown by the books of the company."

This balance-sheet was presented at the general meeting of December 14, 1908. The payment of the commission was challenged as improper, but Mr. Woodington said it was a matter for the shareholders to sanction it or not and that he had no power to surcharge. The solicitors' fees were not challenged. Drummond was appointed a director at this meeting. The meeting was adjourned until April 22, 1909, when the balance-sheet was adopted.

The second balance-sheet, made up to February 28, 1910, contained (inter alia) the following items on the assets side:—

	£	*s.*	*d.*
Properties Account . . . . (Consideration paid, 15,000*l.* in fully paid up shares and 5000*l.* in cash) .	20,000	0	0
Preliminary expenses for incorporation of company, duty, fees and other disbursements .	250	0	0
Commission paid for obtaining subscriptions for shares as set out in last balance-sheet . .	338	10	0
Expedition Account— Mr. Myring's outlay and expenses . . .	6781	3	0
R. E. Lembcke: Amounts paid to him to be accounted for	1310	0	0
Law charges from March, 1907, to July, 1909 .	169	18	3

The auditors certified as follows: "We have to report that the first three items on the assets side are stated in exactly the same form as on the last balance-sheet adopted by the shareholders, that the only voucher we have seen for Mr. Myring's outlay and expenses amounting to 6781*l.* 3*s.* has been a copy of an account signed by him, and that the 1310*l.* charged against Mr. Lembcke has been paid and remitted to him, but no account of the expenditure has yet been rendered. With these qualifications we report that we have obtained all the information and explanations we required, and in our opinion such balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of our information and the explanations given us and as shown by the books of the company." The 100*l.* cheque to the Army and Navy Stores was included in the 6781*l.* 3*s.* debited to Myring. This balance-sheet was adopted at the general meeting of March 17, 1910. Edgar having died, Drummond having retired, and Caldwell not seeking re-election, Pratt and Van Heemstede were appointed directors. The auditors were not re-elected. The meeting was adjourned to June 30, 1910.

On January 3, 1912, an extraordinary resolution for voluntary winding up was passed and a liquidator appointed, and on May 7, 1912, the present summons was issued. Mr. Woodington's evidence as to the two audits is stated in the judgment.

Clauson, K.C., and *Arthur Mulligan*, for the liquidator. The payment of the commission for placing shares was not authorized by the articles, namely, Table A (1906). It was therefore illegal under the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8, and the Companies Act, 1907 (7 Edw. 7, c. 50), s. 8, now replaced by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89. Again, Table A contains no power for a director to contract with the company. The payment of profit costs to Paul E. Vanderpump was therefore illegal: *Aberdeen Ry. Co.* v. *Blaikie* (1); Palmer's Company Precedents, 11th ed. pt. i. p. 732. Myring's contracts, including the provision against vouching, were also void, so that the 36*l.* 3*s.* 8*d.* required vouching.

The auditors ought to have drawn attention to all these points. Under Table A, art. 109, their duties were regulated by the Companies Act, 1900, ss. 21, 22, 23, or any statutory modification thereof for the time being in force. At the first audit they were regulated by the Companies Act, 1907, s. 19, and at the second by the Companies (Consolidation) Act, 1908, s. 113, and under each section they had to report whether they had obtained all the explanations and information they required and whether the balance-sheet was properly drawn up so as to exhibit a true and correct view of the company's affairs "according to the best of their information and the explanations given them, and" as

(1) (1854) 1 Macq. 461, 471.

shewn by the books of the company. The words in inverted commas were first added in 1907. It is obvious that the balance-sheets in fact fell very far short of those requirements, and it is submitted that the auditors were guilty of culpable negligence.

Company auditors are bound to make themselves acquainted with the company's memorandum and articles and with the company law for the time being and to audit on that footing: *Leeds Estate Building and Investment Co.* v. *Shepherd* (1); *In re London and General Bank* (No. 2) (2); *In re Kingston Cotton Mill Co.* (No. 2) (3); just in the same way that auditors under the Public Health Act, 1875 (38 & 39 Vict. c. 55), must learn their statutory duties under s. 247 and audit accordingly: *Thomas* v. *Devonport Corporation* (4); *Attorney-General* v. *De Winton* (5); *Rex* v. *Roberts.* (6) The respondent auditors were therefore bound to know and point out that the commission and profit costs were illegal payments and that the 36*l.* 3*s.* 8*d.* required vouching.

G. C. Rankin, for Myring.

Frank Dodd, for the auditors. The Companies Act, 1900, s. 8, sub-s. 3, provides that nothing in the section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay. This proviso was left untouched by the Companies Act, 1907, s. 8, and the Companies (Consolidation) Act, 1908, s. 89, sub-s. 3, contains a similar proviso. Now the payment of commission or brokerage to brokers for placing shares was clearly lawful before 1900: *Metropolitan Coal Consumers' Association* v. *Scrimgeour* (7); Buckley on Companies, 9th ed. p. 215. Thew and Scott were in fact acting as the company's brokers for this purpose, and the payment of their commission was lawful. In any case the auditors were entitled to rely on the memorandum and the board resolution of March 16, 1908, and assume the latter was in order. Auditors are not concerned to see whether the directors' acts have been intra vires or ultra vires—*Spackman* v. *Evans* (8); Buckley on Companies,

(1) (1887) 36 Ch. D. 787, 802.

(2) [1895] 2 Ch. 673, 682.

(3) [1896] 2 Ch. 279, 284.

(4) [1900] 1 Q. B. 16, 21.

(5) [1906] 2 Ch. 106, 119.

(6) [1908] 1 K. B. 407.

(7) [1895] 2 Q. B. 604.

(8) (1868) L. R. 3 H. L. 171, 236.

9th ed. p. 509—at all events unless their suspicion is aroused. They were therefore entitled to pass the payment in their first balance-sheet, and a fortiori in their second balance-sheet after it had been questioned and confirmed in general meeting. No damage resulted from either entry, and the auditors are not liable: *Bentinck* v. *Fenn.* (1)

A similar principle applies to the costs. The payments were all confirmed by board resolutions and the 250*l.* was treated as an agreed sum. The payments of the 250*l.* and the 20*l.* were not questioned at the first general meeting and the balance-sheet containing these entries was confirmed at the adjourned meeting. The second balance-sheet containing similar costs was confirmed at the second general meeting. It did not occur to the auditors or any one else at either meeting that these payments to the extent of profit costs were illegal. That is not really a matter of company law, but of the general law of trusts or the law of principal and agent, which an auditor can scarcely be expected to have at his fingers' ends. It is indeed tolerably certain that if the point had been thought of and the question raised in general meeting the company would not have deprived its solicitor of his ordinary profit costs, so that the liquidator has not shewn any damage under this head.

The 36*l.* 3*s.* 8*d.* was included in the amounts debited to Myring under his contracts. These contracts were authorized by board meetings and their validity was never questioned. It was not the auditors' duty to go behind the resolutions of the board, but even if they had been sufficiently astute to discover the point and draw it to the attention of the company, it is inconceivable that the company would not have confirmed contracts forming its whole and only substratum. The liquidator fails to prove any damage under this head.

Company auditors must of course have a general working knowledge of company law, but they are not required to be highly trained legal experts or to be suspicious. Their duties are exhaustively defined in *In re London and General Bank* (No. 2) (2), *In re Kingston Cotton Mill Co.* (No. 2) (3), and *Henry*

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(1) (1887) 12 App. Cas. 652, 662, 669.

(2) [1895] 2 Ch. 682—685.

(3) [1896] 2 Ch. 279, 284.

Squire Cash Chemist Ld. v. *Ball, Baker & Co.* (1) Their business is "to ascertain and state the true financial condition of the company at the time of the audit and nothing more," and they are not in the position of auditors under the Public Health Act, 1875, s. 247, who have quasi-judicial duties of surcharging past illegal payments: *Rex* v. *Roberts.* (2) In *Leeds Estate Building and Investment Co.* v. *Shepherd* (3) wholly delusive balance-sheets were prepared by the manager with the object of shewing a profit available for dividend. The auditor was guilty of the grossest negligence in passing them and was consequently liable for the improper payment of a dividend based thereon. That is far removed from the present case.

Clauson, K.C., in reply. The costs cheques were all signed by Paul E. Vanderpump and another director and confirmed by a board including Paul E. Vanderpump. The auditors ought to have ascertained in each case whether there was a quorum without him. A company auditor must have a competent knowledge of company law. He must call attention to that which is wrong: *Newton* v. *Birmingham Small Arms Co.* (4) The auditors ought to have drawn express attention to the illegality of the contracts, commissions, and profit costs, and the onus is on them to shew that no damage resulted from their omission. At the time of the audits the company could probably have recovered some of the money from the directors, and I ask for an inquiry as to damages.

Cur. adv. vult.

Dec. 2. ASTBURY J. This is a misfeasance summons by the liquidator of this company, which was brought originally against two directors of the name of Myring and Lembcke, the solicitor, who was also a director, of the name of Vanderpump, and the two auditors, Messrs. Woodington and Bubb, seeking to make the first two respondents liable for very large sums retained by one or other of them in connection with the company out of its assets, seeking to make the solicitor liable for profit costs, and the auditors liable in respect of certain payments which I will deal with in a moment. The first two directors were also charged with the same sums as are sought to be recovered from the auditors. The present respondents who remain are the auditors, with whom alone I have to deal. A consent judgment has been taken against the respondent Myring, the respondent Lembcke has escaped liability on the ground of diplomatic privilege, and the solicitor, Mr. Vanderpump, is dead.

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(1) (1911) 27 Times L. R. 269; 28 Times L. R. 81.

(2) [1908] 1 K. B. 407, 437, 438.

(3) 36 Ch. D. 787.

(4) [1906] 2 Ch. 378, 388.

The company was incorporated on March 22, 1907, generally to acquire mining property in Bolivia. In the absence of special articles Table A (1906) applied, and the directors obtained, therefore, no power under the company's regulations to contract with the company. Myring and Lembcke were appointed directors by the signatories on March 15, 1907, and Mr. Vanderpump was appointed solicitor to the company ten days later. On May 16, 1907, a very extraordinary contract was entered into between Myring and the company, reciting that Myring was about to proceed to Bolivia for the purpose of taking up certain gold mining properties already prospected on his behalf, and of prospecting and acquiring others, and provision was made for the payment of his expenses of going out to Bolivia without requiring any vouchers from him in respect of the expenses, and the consideration money in the contract was 20,000*l.*, 5000*l.* in cash and 15,000*l.* in shares. On June 14, 1907, Mr. Vanderpump was appointed a director. On November 29, 1907, a second agreement was made with Myring confirming the first one. The present respondents were appointed auditors of the company on the same date. Now, a minute of a board meeting of February 7, 1908, referred to a payment to the company's solicitor of 100*l.* as "balance of agreed costs of incorporation." This sum was paid by a cheque to the solicitor, signed by himself and Myring. The minute of a board meeting of March 16, 1908, contains a resolution that a commission of 10 per cent. in cash be paid to a Mr. Thew, for introducing subscribers for shares. This gentleman is not shewn to have been a stockbroker, nor did the company in connection with the payment subsequently made in respect of this commission comply with the requirements of s. 8 of the Companies Act, 1900, or s. 8 of the Companies Act,

1907. Myring and Lembcke left England for Bolivia in March, 1908, on what proved to be a wholly abortive attempt to either locate or obtain any title to any of the mining properties referred to in Myring's agreement with the company. On December 14, 1908, the first ordinary general meeting of the company was held, when the first of the two balance-sheets of the company, audited by the respondents with their note appended, was produced. Adverse criticism of the accounts took place at this meeting, which was consequently adjourned, but the balance-sheet and accounts were adopted at the adjourned meeting which took place on April 22, 1909. On March 17, 1910, the second general meeting took place, when the second of these balance-sheets was adopted. The respondent auditors were not re-elected, and ceased as from this date to be officers of the company.

There are four claims made against the respondents, the auditors, as follows: First, for payment of two sums, 329*l.* 10*s.* and 9*l.* paid for commission for placing shares under the above-mentioned resolution of March 16, 1908; secondly, for 150*l.* profit costs admittedly received by the solicitor-director Vanderpump in an amount of 250*l.* paid to him for costs of incorporation of the company; thirdly, the sum of 50*l.* further profit costs admittedly received by the same gentleman out of sums paid to him in respect of rent, clerical work, and further costs; and lastly, 36*l.* 3*s.* 8*d.*, the balance of a cheque drawn by the company in favour of the Army and Navy Stores or bearer, received by Myring and not accounted for. None of these moneys were paid by the company or its directors in consequence of any report or audit made by the respondents, but it is contended by the liquidator that they failed in their duty in passing these amounts in their balance-sheets without drawing attention to the fact that they were wrongful payments under the circumstances, and that the balance-sheets which included them did not in consequence shew the true financial position of the company, and that damage accrued to the company in consequence of this alleged breach of duty.

I will deal first with the audited balance-sheets and what they contain. There are, as I said, two: the first for the period ending November 30, 1908. This shews the 20,000*l.* paid to

Myring, and then it contains the following items: "Preliminary expenses for incorporation of company, duty, fees and other disbursements: 250*l.*" That is the sum in respect of which the 150*l.* claim for profit costs is made. The next item is: "Commissions paid for obtaining subscriptions for shares: 338*l.* 10*s.*," and then there are various sums paid to Messrs. Vanderpump on account of law charges and fees and general expenses detailed as in the account, and then there is a sum of 7381*l.* odd stated to be: "Moneys paid to Mr. Myring for purchase of stores, plant and outfits and to be disbursed by him in Bolivia as per agreements with the company." Then the auditors' note is: "We have obtained all the information and explanations we have required. In our opinion such balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, according to the best of our information and the explanations given us, and as shown by the books of the company." The second balance-sheet is for a period ending February 28, 1910. That contains, as far as the present case is concerned, the same items, but at the foot of the balance-sheet is the following note: "We have to report that the first three items on the assets side are stated in exactly the same form as on the last balance-sheet"—that is, the 20,000*l.*, the 250*l.*, and the 338*l.*—"adopted by the shareholders, that the only voucher we have seen for Mr. Myring's outlay and expenses, amounting to 6781*l.* 3*s.*, has been a copy of an account signed by him, and that the 1310*l.* charged against Mr. Lembcke has been paid and remitted to him, but no account of the expenditure has yet been rendered. With these qualifications we report that we have obtained all the information and explanations we required, and in our opinion such balance-sheet is properly drawn up," and so on.

Mr. Woodington, one of the respondent auditors, has given his account of his conduct as auditor in an affidavit upon which he has been cross-examined before me, and the result of his evidence is as follows: First, as to the moneys paid for commission. Mr. Woodington attended the shareholders' meeting on December 14, 1908, when attention was called to this item—and it was alleged to have been an improper payment—

Mr. Woodington said at the meeting that it was a matter for the shareholders to sanction or not, that he had no power to surcharge, and could only shew what had become of the money. Mr. Woodington admitted to me that he knew there were provisions in the Act as to underwriting commissions, and that there must be authority in the articles to pay them, but he says that when he saw the payments in the books he looked at the memorandum of association to see if there was power to pay such commissions, and found it there, as is the fact. No further mention was made of the matter, and the same item was entered and passed in the second balance-sheet as above mentioned, without further inquiry or investigation. Secondly, as to the 150*l.* profit costs received by Mr. Vanderpump, Mr. Woodington says that the payment of the bill of which this forms part was authorized by the directors as appearing in the minutes, but he never inquired whether, excluding Mr. Vanderpump, there was a quorum present at the meeting authorizing it. He says that a voucher was produced to him, and that it never suggested itself to him that it was a part of his duty as auditor to decide whether the payment was legally proper or not—that he saw the minute of February 7, 1908, referring to the agreed costs of incorporation, which agreement he presumed was made before Vanderpump became a director. He never asked for the agreement, and it did not occur to him that there was any difficulty in a solicitor-director making a profit. He cannot say whether he saw the cheques given in payment; the receipt which he saw for the money appears to refer to directors' meetings, the dates of which are wrongly given, but he made no further inquiry or investigation with regard to it. Thirdly, as to the 50*l.* further profit costs made by Mr. Vanderpump, Mr. Woodington says in his affidavit: "The whole of the items making up the said sum with the exception of the last three"—that is, referring to a total sum of which this forms part—"were expended before my said firm had been called upon to act as auditors for the company while the last item (15*l.* 3*s.* 3*d.* of September 9, 1911) is after my firm had ceased to be auditors they not having been re-elected at the second ordinary general meeting held on March 17 and (by adjournment) June 30, 1910. All the said payments made during the period of my auditorship were authorised or ratified by resolutions of the board of directors and appear clearly in the books of the company." He says with regard to these payments no objection to the same on the ground of illegality was raised at any of the meetings which he was present at, and he states he is not competent, nor does he consider it part of his duty as auditor, to tax a solicitor's bill of costs. Fourthly, with regard to the last item of 36*l.* odd, Mr. Woodington states that this amount is the balance of a sum of 100*l.* paid to the respondent Myring by an open cheque made payable to the Army and Navy Stores or bearer handed to and cashed by Myring, and that he has acknowledged the receipt of the same, and that the full amount of the cheque forms part of the sum appearing on the assets side of the balance-sheets in the items I have read.

In support of the liquidator's contention on the above facts, it is alleged that as regards company finance, of which they profess to be experts, auditors must at least make themselves acquainted with the general features of such legal regulations as govern the methods and restrictions as to limited companies' accounts and finance, and that the accounts as audited by them must correspond with the reality in law of the company's financial position, and that damages must be assumed to have resulted in this case from its not having been pointed out in time that the directors were liable to refund these moneys.

Now, there are some legal matters which an auditor must obviously know, as there are others which it is equally obvious he could not be held responsible for not knowing, and it may not always be easy to say in which category any particular case falls. I think that auditors of a limited company are bound to know or make themselves acquainted with their duties under the articles of the company whose accounts they are appointed to audit, and under the Companies Acts for the time being in force; and that when it is shewn that audited balance-sheets do not shew the true financial condition of the company and that damage has resulted, the onus is on the auditors to shew that this is not the result of any breach of duty on their part. The authorities, however, are not very clear as to what, if any, is the liability of auditors of a limited company for including or passing in accounts audited by them sums paid by the company or its directors prior to the audit, and which by reason of the want of authority in the regulations of the company or non-compliance with some statutory provision of the Companies Acts ought not in the particular circumstances to have been paid, nor, if any liability would otherwise exist, what is sufficient by way of warning or identification in the audited accounts for the necessary information to be expressly conveyed by the auditors to the company in order to free them from further responsibility.

The following are the principal authorities dealing with the duties and responsibilities of auditors.

In *Spackman* v. *Evans* (1) Lord Chelmsford said "It would be no part of their office to inquire into the validity of any transaction appearing in the accounts of the company," and it has been doubted by a text-writer of great authority whether a company's auditors are under any duty to determine whether the acts of the board have been intra or ultra vires, their duty being, on the other hand, to ascertain and state the financial result of these acts.

In *Leeds Estate Building and Investment Co.* v. *Shepherd* (2) Stirling J. said: "It was in my opinion the duty of the auditor not to confine himself merely to the task of verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the articles of association (and consequently a proper income and expenditure account), and was properly drawn up, so as to contain a true and correct representation of the state of the company's affairs." And the learned judge, referring to the fact that the auditor who knew of the company's articles did not look at them, stated that this fact afforded some evidence as to the degree of care exercised by him. This case established that if, as the natural consequence of an auditor's breach of duty, payments are made which are a misapplication of the company's funds, the auditors are responsible.

(1) L. R. 3 H. L. 171, 236.

(2) 36 Ch. D. 787, 802.

In *In re London and General Bank* (1) Lindley L.J. says: "It is impossible to read s. 7 of the Companies Act, 1879, without being struck with the importance of the enactment that the auditors are to be appointed by the shareholders, and are to report to them directly, and not to or through the directors. The object of this enactment is obvious. It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit. The articles of this particular company are even more explicit on this point than the statute itself, and remove any possible ambiguity to which the language of the statute taken alone may be open if very narrowly criticised. It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, How is he to ascertain that position? The answer is, By examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves shew the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to shew the true position of a company, the auditor has to frame a balance-sheet shewing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do shew, but also for the purpose of satisfying himself that they shew the true financial position of the company. This is quite in accordance with the decision of Stirling J. in *Leeds Estate Building and*

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(1) [1895] 2 Ch. 673, 682.

Investment Co. v. *Shepherd.* (1) An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company." Then a little lower down the learned judge says (2): "Such I take to be the duty of the auditor: he must be honest—i.e., he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion." Then a little further on the learned judge proceeds (3): "A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms. Still, there may be circumstances under which information given in the shape of a printed document circulated amongst a large body of shareholders would, by its consequent publicity, be very injurious to their interests, and in such a case I am not prepared to say that an auditor would fail to discharge his duty if, instead of publishing his report in such a way as to insure publicity, he made a confidential report to the shareholders and invited their attention to it and told them where they could see it." And then lastly upon these points the learned judge says (4): "But, as already stated, the duty of an auditor is to convey information, not to arouse inquiry, and, although an auditor might infer from an unusual statement that something was seriously wrong, it by no means follows that ordinary people would have their suspicions aroused by a similar statement if, as in this case, its language expresses no more than any ordinary person would infer without it."

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(1) 36 Ch. D. 802.
(2) [1895] 2 Ch. 683.
(3) [1895] 2 Ch. 684.
(4) [1895] 2 Ch. 685.

In *In re Kingston Cotton Mill Co.* (No. 2) (1) Lindley L.J. said: "I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful." But after holding that the auditor was entitled to rely on returns as to stock made by the manager, who had no apparent conflict between his interest and his duty, he contrasted this with a cashier's accounts of receipts and payments which he said could not be reasonably taken by an auditor without further inquiry.

In *Thomas* v. *Devonport Corporation* (2) Lord Russell C.J., speaking of the duty of an auditor of an urban sanitary authority, said: "I do not subscribe to the doctrine that his sole duty is to see whether there are vouchers, apparently formal and regular, justifying each of the items in respect of which the authority seeks to get credit upon the accounts put before the auditors for audit. I think that is an incomplete and imperfect view of the duties of the auditors. I think an auditor is not only entitled, but justified and bound to go further than that, and by fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are not authorized by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will certainly be to make it public by report to the authority itself, and the burgesses who create that authority."

Applying these principles as best I can to the facts of this case, I have arrived at the following results.

First, as to the sums improperly paid for commission for obtaining subscriptions for shares, I am not satisfied that the respondents failed in their duty to the company in not knowing or ascertaining that the payments were in the circumstances improper in law before they passed them in the first audited balance-sheet, especially having regard to the fact that the balance-sheet states in terms for what the sums in question were

(1) [1896] 2 Ch. 279, 284, 287.

(2) [1900] 1 Q. B. 16, 21.

paid. After they learned at the shareholders' meeting of December 14, 1908, that the legality of these payments was questioned, the meeting was adjourned for the purpose inter alia of inquiries being made into the matter, and the balance-sheet and accounts were subsequently approved by the shareholders at the adjourned meeting, and I do not think that they ought to be held guilty of breach of duty for passing the same entry as to these sums in the second audited balance-sheet, nor do I think, having regard to the fact that the shareholders approved them after discussion as above mentioned, that the liquidator has established that any damage resulted to the company from the auditors having acted as they did.

Secondly, as to the sum received by the solicitor-director, Vanderpump, for profit costs, the position of the respondents seems to me more doubtful. Mr. Woodington has admitted in the box that he made no inquiries beyond asking for and being shewn the receipts for payment, but having regard to the fact that as to the payment of the 250*l.* the minutes stated it to be an agreed sum for the costs of incorporation, and as to both the sums claimed in respect of profit costs that Mr. Vanderpump was not appointed a director until three months after incorporation, and to the question as to how far the auditors were bound to ascertain that in this company no authorization existed for directors to contract with the company and to appreciate that the profit costs of the solicitor's bill were consequently payments unauthorized in law, I do not think that I ought to make any order for payment of these sums by the auditors, although I am far from satisfied with the way in which this part of their audit was conducted. I may add further that I am not satisfied that the shareholders would in this case, any more than in the case of the commissions for placing shares, have taken any proceedings against the directors if this question had been expressly placed before them by the respondents, failing which no damage would have resulted to the company from their action.

Thirdly, as to the sum of 36*l.* 3*s.* 8*d.*, the bearer cheque for 100*l.* was, together with other large sums, handed to Myring for the purchase of stores, plant, &c., and the total amount of these sums was entered in the audited balance-sheets under this heading with the note appended to the second balance-sheet which I have read, and I see no sufficient ground for charging the auditors with any breach of duty as to this.

The result, therefore, is that I do not propose to make any order against the auditors on this summons, but having regard to the general manner in which the audit was conducted, and to the evidence of Mr. Woodington himself, I dismiss the summons against the auditors without costs.

Solicitors: *Castle & Co.; Lewis & Lewis; Maffey & Brentnall; Frank L. Vanderpump.*

G. R. A.

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Oct. 28, 29.

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CATTELL *v.* CATTELL.

[1906 C. 1963.]

In re CATTELL.
CATTELL *v.* DODD.

[1912 C. 1643.]

Will—Accumulation—Accumulations Act, 1800 (*Thellusson Act*) (39 & 40 *Geo.* 3, *c.* 98), *s.* 1—"*Minority of person who if of full age would be entitled to the rents and profits*"—*Persons born after Testator's Death—Successive Minorities.*

The fourth of the periods mentioned in the Thellusson Act during which accumulation is allowed, namely, "The minority or respective minorities only of any person or persons who under the . . . . trusts of the . . . . will . . . . directing such accumulations would for the time being, if of full age, be entitled unto the rents . . . . so directed to be accumulated," is not confined to the minority of persons born in the lifetime of the testator, but extends to the minorities of persons born after his death and also to successive minorities.

The dicta in *Haley* v. *Bannister* (1819) 4 Madd. 275, 277; *Ellis* v. *Maxwell* (1841) 3 Beav. 587, 597; *Bryan* v. *Collins* (1852) 16 Beav. 14; and *Jagger* v. *Jagger* (1883) 25 Ch. D. 729, 733, discussed and not followed.

Decision of Neville J. [1907] 1 Ch. 567, affirmed.

APPEAL from decisions of Neville J. (1) and Swinfen Eady J.

Thomas Cattell by his will dated May 14, 1868, after certain

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specific devises, devised all other his freehold and copyhold hereditaments to the use of three trustees, their executors, administrators, and assigns, for the term of one thousand years upon the trusts thereinafter mentioned, and subject thereto to the use of all the children of any of his sons living at his death or born afterwards, who being sons should attain twenty-one, or being daughters should attain that age or marry, as tenants in common in equal shares per stirpes; and he declared the trusts of the term of one thousand years to be to permit his wife to reside in the mansion-house and to pay her an annuity of 800*l.* a year during widowhood, and to pay annuities of 100*l.* to each of his sons until twenty-five and daughters until twenty-five or marriage, and annuities of 200*l.* to each daughter who should attain twenty-five or marry for the rest of her life, and to raise and pay 2000*l.* to each son at twenty-five and to raise 5000*l.* for the children of each daughter who should die leaving children; and subject to certain powers of maintenance and education of children of daughters out of the income of the sums of 5000*l.* to be raised for them, and of the children of sons out of the surplus income, he directed his trustees to apply the rents and profits, during suspense of the indefeasible vesting of the said hereditaments and premises under the ultimate limitations thereof thereinbefore contained, in payment of the principal sums directed to be raised and paid, or any mortgages or charges which might be subsisting, and to accumulate the surplus income by investment as therein mentioned to form a fund by anticipation for the purpose of such payment; and he directed that the surplus of accumulations not so applied should fall into the residue of his personal estate; and he directed that the ultimate surplus of the rents and profits during the suspense of such indefeasible vesting of the said hereditaments or any part thereof as aforesaid should be applicable as follows:—

"Whensoever there shall be living any child or children of any son or deceased son of mine or there shall have been any such child or children who (being living at my death or born afterwards) shall have died as to a son after attaining the age of twenty-one years or as to a daughter after attaining that age or marrying then such ultimate surplus of the said rents and profits shall

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from time to time be paid or appropriated to and divided between all the children who shall for the time being be living of any son or deceased son of mine and the executors or administrators of every or any deceased child of any son or deceased son of mine which child shall have been living at my death or born afterwards and being a son shall have attained the age of twenty-one years or being a daughter shall have attained that age or married under that age (as personal estate of such deceased child) in equal shares per stirpes. But so nevertheless that as to the share of any minor child of a deceased son of mine any payments during the current year for or towards the maintenance or education of such child under the power hereinbefore in that behalf contained shall be taken into account as part of the share of such child under the trust lastly hereinbefore declared and that with regard both to the residue of the share appropriated to any minor child of a deceased son of mine and to the share appropriated to any minor child of a son of mine then living the same shall during such minority be accumulated by investment thereof and of the resulting income in any such mode as aforesaid with power to vary the investment thereof and every such accumulated fund may be applied (during or after the period of accumulation thereof hereinafter mentioned) for or towards the satisfaction and discharge of any of the principal sums hereinbefore directed to be raised out of the said premises comprised in the said term of one thousand years or of any mortgages or charges effected for raising such principal sums or any of them and if and so far as not so applied shall at the expiration of the period of accumulation thereof be added to and sink into my residuary and personal estate and be held upon the trusts hereinafter declared concerning the same."

If and whenever there should be no person who could take the ultimate surplus of the income under the trusts aforesaid, the testator directed his trustees to divide such income amongst such of his sons as should be living for the time being in equal shares with a trust for accumulation during minority.

The testator gave his residuary personal estate to the same trustees upon such trusts as should most nearly correspond with the uses and trusts thereby declared concerning the freehold hereditaments contained in the said term of one thousand years.

The will also contained a power for the trustees at their absolute discretion, during such suspense of absolute vesting as aforesaid, either to distribute the surplus income pursuant to the trusts aforesaid or apply the same in discharge of the said capital sums therein mentioned.

The testator died on October 1, 1880, leaving his wife, five sons, and three daughters surviving. The widow died in 1893.

On June 29, 1906, the date of the originating summons hereinafter mentioned, two only of the testator's sons were then living, namely, his eldest son, Thomas Randoll Cattell, and his youngest son, Samuel Kington Cattell, the three other sons having died without having been married. Thomas Randoll Cattell had married and had had two daughters, Gladys, who was living and who was born on April 27, 1885, and a younger child who had died in infancy. Samuel Kington Cattell was a bachelor. The testator's daughters were all living; one of them had four children living, the others had no children. The sons had all attained twenty-five, and the sums of 2000*l.* had been raised and paid. The trustees had divided the income of the testator's real and personal estate among his sons until the birth of Gladys, and had then accumulated the income until she attained the age of twenty-one years.

After that event the trustees, on June 29, 1906, took out an originating summons for the determination (inter alia) of the following questions: (1.) Whether according to the true construction of the will and in the events which had happened the trustees ought as from April 27, 1906 (the date upon which Gladys attained the age of twenty-one years), to pay to her the whole or any and what part of (*a*) the surplus rents and profits of the testator's real and leasehold estate not specifically devised, (*b*) the net income of the testator's residuary personal estate, and (*c*) the income to arise from the investments and property in the hands of the trustees representing the surplus income of the real, leasehold, and personal estate since April 27, 1885 (the date of the birth of Gladys), and if so during what period; and (2.) whether the direction for the accumulation of the share of any minor child of a son of the testator in the surplus rents and profits of the real estate during the minority of such child was to any and what extent void having regard to the fact that Gladys Cattell, the only such child who was living at the expiration of a period of twenty-one years from the testator's death, did not attain her majority within such period. The defendants were Gladys Cattell, Thomas Randoll Cattell, her father and the testator's heir-at-law, and Ada Dadley Thornley, a married daughter of the testator and one of his next of kin.

The summons was heard before Neville J., and on February 22, 1907, his Lordship delivered a considered judgment (1) in which he dealt entirely with the case of Gladys Cattell and held that the fourth period of s. 1 of the Thellusson Act could not be confined to cases of persons born in the testator's lifetime and that the accumulations had therefore been properly made and fell into the testator's residuary personal estate.

The order as passed and entered, however, went further than the decision of Neville J. and declared that all the directions for accumulation were valid. It was dated February 22, 1907, and (so far as material) was in the following terms:—

"This Court doth adjudge and declare that the directions or provisions in the said will contained for the accumulation of the share of any minor child of a son of the said testator in the surplus rents and profits of his real and leasehold estates not specifically devised and in the surplus income of his residuary personal estate during the minority of such child were valid and effectual and accordingly that subject to the power of the trustees or trustee of applying the same in or towards the satisfaction and discharge of any of the principal sums by the said will directed to be raised out of the said estates or of any mortgages or charges to be effected for raising such principal sums or any of them the investments and moneys representing the accumulations of such surplus rents and profits and income since the 27th April 1885 (the date of the birth of the defendant Gladys Cattell) are as from the 27th April 1906 (when she attained the age of twenty-one) to be held upon the trusts by the said will declared concerning the testator's residuary personal estate or

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such of the same as are or may for the time being be subsisting or capable of taking effect. And this Court doth also declare that according to the true construction of the said will and in the events which have happened the whole of the surplus rents and profits of the testator's real and leasehold estates not specifically devised and the net income of the testator's residuary personalty (including the income to arise from the investments and moneys for the time being in the hands of the said trustees representing such accumulations as aforesaid) are payable to the defendant Gladys Cattell as from the 27th April 1906 until any other child of a son of the said testator shall be born."

Thomas Randoll Cattell died on February 16, 1911, without further issue.

On February 6, 1912, Frederick Samuel Cattell, the first child of the testator's youngest and only surviving son, Samuel Kington Cattell (who had married subsequently to the order of February 22, 1907), was born, and the trustees thereupon, being doubtful whether the direction to accumulate his share was valid having regard to the former accumulation during the minority of Gladys, on June 10, 1912, took out an originating summons, to which Gladys, who had married and was now Mrs. Dodd, the infant Frederick Samuel Cattell, and Ada Dadley Thornley were made defendants, for the determination of the question (inter alia) whether the directions in the will for the accumulations of the share from time to time appropriated to any child of a son of the testator of the surplus rents and profits of his residuary real and leasehold estates and of the surplus income of his residuary personal estate during the minority of such child were valid and ought to be given effect to as regarded the shares of such rents, profits, and income to be appropriated from time to time to the infant defendant Frederick Samuel Cattell and to any future child of the plaintiff Samuel Kington Cattell, and if not to whom the surplus rents and profits belonged.

The summons was heard before Swinfen Eady J. on November 12, 1912, who declined to answer the question on the ground that it was sufficiently answered by the first declaration in the order of February 22, 1907.

On March 7, 1913, Annie Matilda Cattell, another of the testator's daughters and one of his next of kin, who was not a party to either of the summonses, obtained leave from the Court of Appeal to appeal from the orders of February 22, 1907, and November 12, 1912, on an undertaking by her not to question the application of the surplus rents and profits of the testator's estate accumulated during the minority of Gladys Dodd.

The appeals were heard on October 28 and 29, 1913.

During the hearing of the appeals it was stated that since the order of Swinfen Eady J. was made a second child had been born to Samuel Kington Cattell, and at the suggestion of the Court it was added as a party to the proceedings.

Younger, K.C., and *A. Underhill*, for the appellant. Neville J. in the judgment he delivered dealt entirely with the case of Gladys and held that the accumulations made during her minority were valid, but the order as passed and entered went further and declared that all directions for accumulations in the will were valid. We do not now seek to question the application of the accumulations made during the minority of Gladys.

On the construction of the will it is submitted that there is no gift to infants of the surplus income during the suspension of the period of vesting. The gift is contingent on the infants, if males, attaining twenty-one, or if females attaining that age or marrying. The words "appropriated to" in the accumulation clause have a distinct reference to the infants. The testator has not contemplated that any infant as such should obtain a benefit under the will. They have no interest in the appropriations except with regard to the provision for maintenance.

If the direction to accumulate is held to be void under the Accumulations Act, 1800 (Thellusson Act) (1), the income during

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(1) The Accumulations Act, 1800, s. 1, provides "That no person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor or testator, or during the minority or respective minorities of any person or persons

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the period until the vesting is undisposed of and passes as on an intestacy.

The fourth of the periods mentioned in s. 1 of the Thellusson Act, namely, the minority or respective minorities of any persons who, under the trusts of the will directing such accumulations, would for the time being, if of full age, be entitled to the rents so directed to be accumulated, is the one which is applicable to the present case. Under that clause there cannot under the same will be successive accumulations of the same fund. Here the surplus income of the whole fund has already been accumulated during the whole minority of Gladys, and the income of any part of the fund cannot again be accumulated for a further period of twenty-one years. The accumulation is now done with. There is nothing in the Act to justify the construction that "respective minorities" mean "successive minorities." The Act contemplates that there never can be more than one accumulation of the same fund and that never for more than one period of twenty-one years. The word "entitled" in the clause means being in a position to give a legal receipt for the rents, &c., and does not mean entitled in interest. The power to accumulate can only be for the benefit of an infant absolutely entitled and does not extend to a case where an infant is only contingently entitled. The object of the clause was to get rid of the disability of infants to give receipts. The clause does not extend to a case where the fund would not go to the infant.

Further, the fourth period is confined to the case of persons born in the lifetime of the testator and does not extend to persons

who shall be living or in ventre sa mère at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed."

born after his death. In *Haley* v. *Bannister* (1) Sir John Leach held that the Act prevented the accumulation of interest during the minority of an unborn child, and that view was followed by Lord Langdale in *Ellis* v. *Maxwell* (2), by Sir John Romilly in *Bryan* v. *Collins* (3), and by Kay J. in *Jagger* v. *Jagger* (4). If the construction is adopted which will admit of children not born in the testator's lifetime being included the result will be that there may be a number of successive minorities and the periods of accumulation may last for a very considerable time, which, it is submitted, is contrary to the presumed intention of the Act. [They also referred to Hargrave on the Thellusson Act (1842), p. 131.]

Sir Charles Macnaghten, K.C., and *Sir Philip Baker-Wilbraham*, for Mrs. Gladys Dodd; *Hon. Frank Russell, K.C.*, and *Dighton Pollock*, for the infant children of S. K. Cattell; and *Horace Freeman*, for the trustees, were not called upon to argue.

LORD PARKER OF WADDINGTON. Before I deal with the main question which arises in this case, I should like to say that I myself am not by any means satisfied that, if the direction for accumulation contained in the will be contrary to the Thellusson Act, the appellant, as one of the next of kin, has any interest in the matter at all. I think it is arguable, and at present I am inclined to take the view, that according to the true construction of the will there is a gift (during the suspension of vesting) of all surplus income equally between the children who were from time to time living, and the personal representatives of deceased children who, being sons, have attained the age of twenty-one years, or being daughters have attained that age or married. In that case, if the direction for the accumulation of the infants' shares be avoided by the Thellusson Act, this gift would take effect as if no such direction had been given. However, the Court will not decide that point. I only keep it open in the event of this case going further, so that it will not be thought that we have ignored it. The decision of this Court will rest upon the ground that Neville J. was right in deciding that there

(1) 4 Madd. 275, 277.

(2) 3 Beav. 587, 597.

(3) 16 Beav. 14.

(4) 25 Ch. D. 729.

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is nothing in the Thellusson Act to avoid the direction the testator has given in this case.

In construing the Thellusson Act, it must be remembered that it is not an enabling but a disabling Act. Prior to the passing of the Act a testator had the right to direct an accumulation for any period he chose, provided he did not exceed the time which was allowed by the perpetuity rule—that is to say, lives in being, and twenty-one years afterwards. The Act was passed in order to disable testators from taking full advantage of the liberty which they had hitherto enjoyed in that respect. The terms of the Act are "That no person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than"—then there are four alternative periods given, and it has been held, and I think rightly held, that of those four periods one only can be selected by the testator. The difficulty arises in this case in regard to the fourth period. The first contemplates the case of a man who settles property otherwise than by will, in which case he may direct that the rents and profits be accumulated during his life. The settlor cannot direct an accumulation during his life and some further period. The second period contemplates an accumulation which is to commence from the death of the settlor, and includes the case of a settlor by will. No such accumulation is to go on for more than twenty-one years. Then the third alternative is a period—almost the same period of twenty-one years from the death of the settlor—during the minority or respective minorities of any person or persons "who shall be living or in ventre sa mère" at the time of the death of the settlor. That of course must be limited to twenty-one years, and some further period representing gestation in the case of a child yet unborn. Then there is the fourth alternative, which gives rise to the difficulty in the present case, and that is "or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated." It is to be observed that this last alternative clause closely follows and seems to be contrasted with the alternative with regard to the minority or respective minorities of any person or persons who should be living or en ventre sa mère at the time of the death of the settlor. One would not therefore expect it to be limited (as contended by the appellant) to children living or en ventre sa mère at the settlor's death. Indeed if so limited it would in effect add nothing to the preceding alternative. The reason urged in support of the appellant's contention rests mainly on certain decisions which it is said we ought to follow and to which I will now refer.

The first of those is *Haley* v. *Bannister.* (1) In that case there was a direction to accumulate for the children of a daughter and the accumulation was to commence as from the death of the testator. It was decided that having commenced from the death of the testator, the accumulation could not be prolonged for any period exceeding twenty-one years from that date, the argument being that it could be prolonged during the infancy or the minority of a subsequently born child. I will not go further into the particulars of the case, and I will only refer to what Sir John Leach V.-C. said. There was no argument, as my brother Warrington points out, on the general question, but only upon the particular events which had happened. The Vice-Chancellor said: " The statute prevents an accumulation of interest during the minority of an unborn child." I think the Vice-Chancellor means to say that the statute prevents the accumulation of interest during the minority of an unborn child of the daughter. I do not think he was intending to lay down any general rule about it at all, and it is a very natural phrase to use without any such intention. That is all I need say with regard to that case. Now that case was referred to in a subsequent case of *Ellis* v. *Maxwell* (2), in which the facts were practically on all fours with the facts which occurred in *Haley* v. *Bannister.* (1) Lord Langdale in giving his decision in that case—it was not a decision, it was

(1) 4 Madd. 275, 277.

(2) 3 Beav. 587.

merely a dictum—said (1): "In *Haley* v. *Bannister* (2), Sir John Leach expressed his opinion to be, that the statute prevents an accumulation during the minority of an unborn child." That to a certain extent is correct, but Lord Langdale appears to have thought that Sir John Leach was laying down some general rule irrespective of the circumstances of the case which he was deciding at the time, and in this I think he was mistaken.

Then there is the case of *Bryan* v. *Collins*. (3) There again the facts of the case were on all fours with those in the preceding cases I have quoted at any rate in this respect, that the accumulation which was directed began from the death of the testator, and, therefore, could not be carried on for a term of the twenty-one years and some further period, namely, the minority of an unborn child. Sir John Romilly M.R. says in that case: "In the case of *Haley* v. *Bannister* (2), Sir John Leach held, that the statute prevented an accumulation of interest during the minority of an unborn child; or, in other words, that the statute referred only to the minority or successive minorities of persons in existence at the time when the will came into effect; and this same point is affirmed and extended in *Ellis* v. *Maxwell* (4)." I do not see myself that there is any such affirmation or extension, but it is clear that Sir John Romilly thought that Sir John Leach had decided what I do not think myself he had any intention of deciding at all.

In this state of the authorities I do not think we are bound to decide, with regard to the fourth alternative period, that it is limited to persons who are in existence or en ventre sa mère at the death of the testator, unless we are of opinion that this is the natural interpretation of the Act. In my opinion the fourth alternative period covers not only children who are born or en ventre sa mère at the death of the settlor, but children who are subsequently born, and I think the fact that the fourth alternative comes immediately after, and in contrast with, the third alternative, which refers only to born children, and children en ventre sa mère, at the time of the death of the settlor, points strongly to this conclusion.

(1) 3 Beav. 597.

(2) 4 Madd. 275, 277.

(3) 16 Beav. 14, 17.

(4) 3 Beav. 587.

Then we have a second argument advanced, that the children referred to are not children who would if of full age be entitled to the income directed to be accumulated, but are only those children who, if no accumulation had been directed, would be entitled to the income. Again I cannot see why we should not construe the words in their ordinary and natural meaning. However, again, on that there is a dictum of Kay J. in *Jagger* v. *Jagger* (1), in which he does seem to think that the real question is not "would the child, if of full age, have been entitled to the income directed to be accumulated?" He puts it in this way: "Now as to the fourth period, the meaning of the Act appears to me to be that if there is an accumulation directed during minority, and the person during whose minority it is directed to be made can at any time say: 'But for this accumulation I should be absolutely entitled to the dividends, the accumulation is to be valid during the minority of that person." I do not quite see how the learned judge arrived at the conclusion that that was the true meaning of the Act. Clearly it is not. The question is would that child, if of full age, have been entitled to the income, which is a very different question. Therefore I think with regard to the dictum in *Jagger* v. *Jagger* (1), holding as we do a clear opinion as to the true meaning of the Act, we ought to disregard it for the purposes of this decision.

Then comes the last argument, which is an argument really on the presumed intention of the Act. It is said—and I think said with some truth—that in this case if we adopt the construction which allows a child who is not born at the death of the settlor to be one of the children during whose minority or respective minorities the accumulations are directed to be made, then we allow successive accumulations to be made of what practically, if not theoretically, is the same fund, which accumulations taken together may last for a considerable time. I think that may be true, but at the same time it is worth bearing in mind that though these periods may when added together amount to a considerable time, yet the periods in question are not really within the vice against which the Act

(1) 25 Ch. D. 729, 733.

is directed. Where a beneficiary is of full age a trust for accumulation operates to postpone his enjoyment, but in the case of an infant his inability to give a receipt would in any case postpone his enjoyment during his minority. That consideration is very well put by Mr. Hargrave in his Treatise on the Thellusson Act, published in 1842, to which Mr. Underhill kindly called my attention. The first thing he says, on p. 131, is that *Haley* v. *Bannister* (1) must be limited to those cases where accumulations have been directed to commence at the testator's death, and Sir John Leach does not, in his opinion, lay down any large or general rule. Then he goes on, "But wherever a testator has directed an accumulation, which will only commence in the event of the beneficial owner being a minor, and which will be limited by, and engross only such, income as would have been otherwise accumulated by force of law during such minority, the trust for accumulation seems to be founded on a different principle, unproductive of mischief, within the express words of this clause, and not impeachable from any reported case." That is to say, the cases with which we are dealing not being within the vice of the Act, and there being nothing in the express words of the Act to prevent us giving effect to the old powers which were possessed by testators before the Act, there is no reason to construe the fourth alternative in any other way than I have suggested. It is well known that settlements are and have been drawn up on this footing. A testator may often direct a settlement of property upon A. for life, and after his death upon his children on attaining twenty-one, and if he goes on to provide that during the minority or respective minorities of his children the income of the property shall be accumulated, it is only a clause in common form. I have never known any doubt to be thrown on the validity of such a clause, but if the appellant's contention prevailed its validity would be open to question. It seems to me, therefore, that Neville J. was right in his decision, and that this appeal ought to be dismissed.

Having regard to the importance of the case, and to the fact that Mr. Younger's client was not present on the former occasion, and that there does not seem to have been any full discussion of the points that have been raised, I think it is a case where we may direct that the costs of all parties as between solicitor and client shall come out of the fund directed to be accumulated.

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(1) 4 Madd. 275.

LORD SUMNER. I entirely agree.

WARRINGTON J. I agree, and I wish to add only a very few words.

It seems to me that in dealing with a question of this kind the only safe way of proceeding is to inquire what is the plain meaning of the words in the Act as they stand. Now the direction to accumulate in this case is to accumulate the share appropriated to a particular infant of certain surplus rents, profits, and interest. The infant whose share of the income appropriated is to be accumulated is plainly in the words of the Act a person who, if of full age, would for the time being be entitled to that income. The direction to accumulate is confined to the minority of that person. Now it seems to me that that falls exactly within the words of the Act, and that we are, therefore, bound to say that an accumulation for such a period is not prohibited by the Act. The difficulty, if any difficulty there be, arises from a suggestion that we are bound by authority to give some other construction to the Act than that which I have said I think is the plain meaning of the words themselves. In my opinion there is no such authority. I believe the whole difficulty has arisen from what I think I may safely say is the inaccuracy of the head-note to the case of *Haley* v. *Bannister*. (1) That head-note has probably crept into the text-books, and has given rise to the idea that the case has decided something which it did not decide. The head-note is in general terms: "The statute prevents an accumulation, directed by will, of interest during the minority of an unborn child." Now that is not what Sir John Leach decided. I have before me the original edition of the book published in 1821, and in the margin of the report of this case there is written in old handwriting, and quite obviously before the book was bound, these words as a note to the head-note: "under the special circumstances of this case, and

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(1) 4 Madd. 275.

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not in other cases." I believe that to be an accurate correction of the head-note to *Haley* v. *Bannister*.(1) If the head-note had been expressed in those terms we should never have had the arguments which have been addressed to us. I only wish to add that Mr. Theobald in his book on Wills (6th ed. p. 591), referring to the words of the fourth clause, says "it has been doubted whether these words would authorise an accumulation during the minority of a person not born at the date of the death, but if not, they are superfluous." He, therefore, at all events, did not take it that the point had been decided by the cases. We ought to look at the words of the Act itself, and doing this I feel no doubt that the direction for accumulation in this case was valid, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co., for A. I. Sherwin, Birmingham; Collyer-Bristow, Curtis, Booth, Birks & Langley, for Forsyth, Bettinson & Co., Birmingham.*

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In re MARSHALL.

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[1913 M. 424.]

Will—Residue—Trust for Sale and Conversion—Power to postpone—Shares in Limited Company—Appropriation of in respect of Shares in Residue—Voting Power—Right of one Residuary Legatee to Transfer of his Proportion of Appropriated Shares of Company—Discretion of Trustees.

Testator by his will devised and bequeathed his residuary real and personal estate, which included a large number of shares in a limited company, to trustees upon trust to convert, and he empowered them to postpone the conversion of the whole or any part of his residuary estate during so long as his trustees in their uncontrolled discretion should deem proper, and in particular to retain any shares, stocks, and securities of the company, or any other investments held by him at his death, during any period without being liable for any loss

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arising thereby. He then divided his estate into certain shares, some of which he settled.

Several of the trustees were directors of the company and had large holdings; and it was stated that if these shares were all kept together the trustees would have a preponderating influence in the company.

In the events which had happened a son and two grandsons of the testator were absolutely entitled to certain shares of the residuary estate and claimed to have transferred to them their proportion of the shares in the company:—

Held (reversing the decision of Warrington J.), that the company was a public company; that the trustees had not shewn that it was necessary or desirable in the circumstances to retain all the shares; that the power to postpone was for a reasonable time only; and that in the absence of special circumstances the right of the absolute owners to have a transfer of their shares ought to prevail over the discretion of the trustees.

Appeal from a decision of Warrington J.

Henry Dickenson Marshall by his will dated November 12, 1902, after giving a number of legacies, devised and bequeathed his residuary real and personal estate to his trustees, namely, his widow, Mary Ann Marshall, his brother James Marshall, his sons Percy James Marshall and Hermann Dickenson Marshall, and his friend Edward Thomas Moore, upon trust for sale and conversion, and he directed his trustees to pay certain pecuniary legacies to his children and to divide his ultimate residue into twenty-five parts. He then settled five equal twenty-fifth parts (or one fifth) upon trust for the benefit of his son William Ernest Marshall and his wife and children; five other equal twenty-fifths he gave absolutely to Percy James Marshall, and another five equal twenty-fifths to Hermann Dickenson Marshall. Two twenty-fifths he settled in trust for his daughter Mrs. Emily Eliza Graepel; two twenty-fifths in trust for his daughter Miss Kate Margaret Marshall; two twenty-fifths in trust for his daughter Mrs. Mary Hilda Smith; two twenty-fifths in trust for his daughter Miss Ethel Blanche Marshall; and the remaining two twenty-fifths in trust for his daughter Mrs. Mabel Agnes Thorpe. William Ernest Marshall's share he settled upon him for life and after his death amongst his children on their attaining twenty-one in equal shares, except that his sons Henry Douglas Marshall and Cedric Hewerdine Marshall were each to take a double share. The daughters' shares in the residue as well as the legacies given to them were settled on the usual trusts in favour of daughters and their children, with a gift over on the failure of any of the trusts among the other children. The will contained the following clause: "I empower my trustees to postpone the sale calling in and conversion of the whole or any part or parts of my real and personal estate hereinbefore given in trust for sale calling in and conversion during so long as my trustees in their uncontrolled discretion shall deem proper and in particular to retain any shares stock or securities of Marshall Sons and Company Limited or any other investments held by me at my death during any period without being liable for any loss arising thereby."

The testator died on March 8, 1906. William Ernest Marshall died in the lifetime of the testator and left five children. Mrs. Smith also died in the lifetime of the testator without leaving issue, and her legacy and share of residue had therefore accrued to the shares of the other children. Miss Ethel Blanche Marshall after the testator's death married and had since died leaving issue. Percy James Marshall in the events which had happened was therefore entitled to the original one-fifth of the residue, plus a one-seventh share of the two twenty-fifths of the residue (making 37-175ths) which had fallen in in consequence of the death of Mrs. Smith.

The two defendants Henry D. Marshall and Cedric H. Marshall, having attained twenty-one years, were each entitled to a two-seventh share of 37-175ths of the residue, subject to an annuity payable to their mother.

The trustees in due course prepared a scheme for the division and appropriation of the testator's estate amongst the parties beneficially interested; appropriating, agreeably with the directions of the will, preference and ordinary shares in the company on account of legacies and shares of residue; and they proposed to retain the remaining shares in the company, consisting of 8462 20*l.* 5 per cent. preference shares and 82,730 1*l.* ordinary shares, such shares being retained for the purposes of sale as and when the trustees should think it desirable, and in the meantime for division of income.

The nominal share capital of Marshall, Sons & Co., Limited, incorporated in 1862, consisted of 750,000*l.* divided into 50,000 preference shares of 5*l.* each and 500,000 ordinary shares of 1*l.* each. All the shares had been issued and fully paid up. There were now 213 ordinary and 151 preference shareholders. The directors in 1913 were James Marshall, who was a trustee of the will, Herbert John Marshall, Hermann Dickenson Marshall, who was a trustee, William George Whiffen, and James Hugh Marshall. All the trustees held large numbers of shares in the company. The shares of the company were quoted on the Sheffield and Lincoln Stock Exchanges and it was treated as a public company. By clause 25 of the articles of association any member might transfer his shares, and by clause 28 the directors might in their discretion, and without assigning any reason therefor, refuse to register a transfer. By clause 80 every member had one vote only on a show of hands, and in case of a poll every member had one vote for every four preference shares and one vote for every twenty ordinary shares held by him. By clause 70A preference shareholders were not entitled to vote at general meetings unless their dividends were in arrear or their interests affected.

This was an originating summons taken out by the two independent trustees of the will for the determination (inter alia) of the questions (1.) whether the trustees ought to transfer to Percy James Marshall in or towards satisfaction of his share of the residuary estate of the testator any, and if so how many, of the shares in the company now held by the trustees; and (2.) whether the trustees ought to transfer to Henry Douglas Marshall and Cedric Hewerdine Marshall respectively in or towards the satisfaction of their respective shares of the residuary estate of the testator any, and if so how many, of the shares now held by the trustees.

Warrington J. said that the case he had to deal with was not that of undivided shares in real estate or of a sum of cash, but of shares in a private company which were at present held by the trustees. He was asked to say that they ought to transfer a proportion of these shares to certain beneficiaries. The effect of such a transfer might be to alter the position of all the parties entitled to the shares. The trustees would be in a totally different position if they gave up their voting power in respect of them. If they were to treat themselves as bound to transfer a proportion of the shares it would for ever put it out of their power to control the market as regarded the rest of the shares; whereas if they continued to hold this large block of shares they would have considerable power of affecting the market price. These considerations shewed that it would not be right to hold that P. J. Marshall and the two grandsons were as a matter of right entitled to require a transfer of the shares. In his Lordship's opinion the trustees were still entitled to exercise the discretion vested in them by the will. The question asked by the summons must therefore be answered in the negative.

P. J. Marshall and the two grandsons appealed.

Clauson, K.C., and *Tomlin, K.C.*, for the appellants. The appellants are absolutely entitled to their respective shares of the residue, the undistributed part of which now consists almost entirely of shares in Marshall, Sons & Co., Limited. There is no difficulty in transferring to them at once their respective portions of these shares, and no good reason is suggested why this should not be done. No one has a right to insist on a sale, and the trustees have no right to insist on postponement. If these shares were Consols there would be no answer to the appellants' claim, and the same rule applies, for Marshall, Sons & Co., Limited, is not a private company.

[They were stopped by the Court.]

Peterson, K.C., and *W. M. Cann*, for other beneficiaries. The appellants are not entitled to transfers of the shares in question. The powers of the trustees must be exercised for the benefit of all the persons interested, and they say that in their discretion they do not think it desirable now to distribute the shares. The appellants are not absolutely entitled; they are only entitled subject to the trustees' power of postponement. The shares in question represent the testator's business, and by continuing to hold them the trustees retain a control over the directorate, over the management of the business, and over the market price of the shares. In the interests of the other beneficiaries it is

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important that these advantages should be retained. If the trustees were to part with large blocks of these shares they might and probably would lose the control which they now have, and it might even be that undesirable persons would become shareholders in this business, which is really a family concern. The right to take these shares in specie depends on this, that if the funds are ready for distribution the beneficiaries can elect to take the shares instead of cash, but that assumes that there is a trust for sale and no power of postponement, and that it does not matter to the others whether the appellants get the shares in specie or not. Trustees with a power of postponement can answer such an election by saying they do not intend to sell the shares at present. The testator did not intend the appellants to have the right to call for a transfer of these shares, unless they could shew that the other beneficiaries would not be injuriously affected by the transfer. He has taken great care to prevent the splitting up of this voting power.

Cave, K.C., and *J. Dixon*, for the trustees. The trustees do not desire to contest this question contentiously, but they would point out that a transfer would weaken the position of the other beneficiaries, which would not be the case if these shares were Consols. If the shares were land the appellants could not call for a transfer—*In re Horsnaill* (1)—and shares in a private company such as this are in a similar position. The appellants have no right under the will to override the discretion of the trustees. The power to postpone continues till all the shares are vested: *Taite* v. *Swinstead* (2); *In re Crowther* (3); *Peters* v. *Lewes and East Grinstead Ry. Co.* (4)

Clauson, K.C., in reply. The discretionary power to postpone cannot have been intended to continue in force till all the shares were vested, perhaps for forty years or more. The Court of Chancery has always leant against the postponement of vesting of possession or the imposition of restrictions on the enjoyment of an absolute vested interest: *Wharton* v. *Masterman* (5); *In re Smith* (6), in which *In re Crowther* (3) was doubted; *Smith &*

(1) [1909] 1 Ch. 631.
(2) (1859) 26 Beav. 525.
(3) [1895] 2 Ch. 56.
(4) (1881) 18 Ch. D. 429.
(5) [1895] A. C. 186, 198.
(6) [1896] 1 Ch. 171.

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Snow v. *Snow.* (1) A testator cannot fetter the mode of enjoyment of persons absolutely entitled: *In re Johnston* (2); *Saunders* v. *Vautier* (3); *Gosling* v. *Gosling.* (4) The power to postpone has no operation as against persons absolutely entitled.

COZENS-HARDY M.R. This is an appeal from a decision of Warrington J., and it raises a point of some interest, and, at first view, of some difficulty. The testator, Mr. Henry Dickenson Marshall, left a very considerable estate, by far the larger portion of which was represented by ordinary and preference shares in the company of Marshall, Sons & Co., Limited. He left legacies and he left a residue, the residue being divided between certain persons. Omitting small fractions, the present appellants may be said to have one fourth of his residue. That is an interest which they had absolutely vested indefeasibly in possession; the other three fourths, or some of them, are settled by the will upon trusts which may, and probably will, last thirty or forty, or possibly even more, years. The will contains as to the residue the usual trusts for sale and conversion. It then says—and the whole of the case turns upon this—after the investment clause: "I empower my trustees to postpone the sale calling in and conversion of the whole or any part or parts of my real and personal estate hereinbefore given in trust for sale calling in and conversion during so long as my trustees in their uncontrolled discretion shall deem proper and in particular to retain any shares stocks or securities of Marshall Sons and Company Limited or any other investments held by me at my death during any period without being liable for any loss arising thereby."

The trustees took out a summons asking whether they were bound to comply with the request of the present appellants to transfer to them their one fourth of these shares, which practically are the bulk of the residuary estate. They took out a summons which in form, perhaps, did not raise the very point which it was desired to raise, but I take it the trustees did intend to leave their discretionary power to be dealt with by the Court;

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(1) (1818) 3 Madd. 10.
(2) [1894] 3 Ch. 204, 208.
(3) (1841) Cr. & Ph. 240.
(4) (1859) John. 265.

and the learned judge held that the trustees were at liberty to postpone, so long as they should, in their uncontrolled discretion, think proper, the sale of the shares now held by them. From that order there is an appeal.

Speaking generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of property, to have that share transferred to him is one which is plainly established by law. There is also another case which is equally plain and established by law, that where real estate is devised in trust for sale and to divide the proceeds between A., B., C., and D.—some of the shares being settled and some of them not—A. has no right to say " Transfer to me my undivided fourth of the real estate because I would rather have it as real estate than personal estate." The Court has long ago said that that is not right, because it is a matter of notoriety, of which the Court will take judicial notice, that an undivided share of real estate never fetches quite its proper proportion of the proceeds of sale of the entire estate; therefore, to allow an undivided share to be elected to be taken as real estate by one of the beneficiaries would be detrimental to the other beneficiaries. But that doctrine, it seems to me, has no application, apart from special circumstances, to personal property. It may apply to a case of a mortgage debt which you cannot conveniently split up into shares; but when you are dealing with the case of a limited company with ordinary and preference shares, you want to know a great deal more than that before you can say that the trustees are entitled to deprive an absolute owner of his right to claim a transfer. When the case was first before us we suggested that we should like to know what were the facts about the company; what was its capital, and the number of its shareholders, and what were the special circumstances of the case; and it stood over in order that we might have better information. That information has now been furnished very conveniently and satisfactorily, and it appears that this is not in any sense a private company in which the testator held a control by holding the majority of the shares, or anything of that kind. It is a case in which there are some 360 shareholders. The amount of the capital now represented by the testator's residuary estate is

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substantially one sixth of the capital. The present appellants hold one fifth of that amount, in regard to which they say to the trustees, "Please transfer to us our one fifth of the block of shares which you are now holding; in our opinion there is no reason whatever why you should be entitled so to hold them."

The right claimed by the trustees, to which effect has been given by the learned judge, seems to me to be dangerous to the last degree; it says that the trustees are at liberty to postpone, so long as they shall, in their uncontrolled discretion, think proper, the sale of the shares. Can we deprive the appellants of their shares until, say, the last of the settled shares become vested in an adult in possession? If so, that is a very serious matter. There may be cases with reference to the particular position of a company like this, at a particular time, which may justify the trustees in exercising their discretion, if they can satisfy the Court that these special circumstances exist; but the case of the present trustees is not put upon that ground at all. The trustees do not base it upon any special circumstances in relation to themselves and the company, but they simply say, "The testator has given us discretionary power—our integrity is not in the least impugned—and we will not transfer to the beneficiary." In my opinion such a contention ought not to prevail as between the rights of an absolute owner to elect to take and to demand from the trustees his fraction of the shares, on the one hand, and the right of the trustees on the other hand. It seems to me that the former ought to prevail.

Further, I am not satisfied that the power to postpone in this will has any bearing whatever on the right of an absolute owner to say "Transfer to me these shares." The object of the power was to justify the retention of those shares as a proper investment of the funds which are settled by the will. For these reasons I think that the order of the learned judge was wrong. The appeal must be allowed.

SWINFEN EADY L.J. I am of the same opinion. The testator by his will, gave the whole of his real and personal estate to trustees "upon trust that my trustees shall sell call in and convert into money." Then there was a provision for an annuity

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for the testator's widow—she is dead—and subject to that, and to certain pecuniary legacies, the testator declared that his trustees should stand possessed of the surplus or residue which should remain of the aforesaid trust moneys after answering and satisfying the trusts, in certain shares for named persons, some of the shares being settled. In substance the appellant Percy James Marshall takes immediately and absolutely one fifth of the residue.

The testator died so long ago as March 8, 1906, and Percy James Marshall, who is one of the appellants, says, "I am entitled to one fifth of my father's residuary estate, and I should like my one fifth to be now transferred to me." The residuary estate, with an immaterial exception, is now represented by certain ordinary and preference shares in the company called Marshall, Sons & Co., Limited. The issued capital of that company is 250,000*l.* in preference shares, and 500,000*l.* in ordinary shares, the ordinary shares being of 1*l.* each, and the preference shares of 5*l.* each. At present the testator's estate holds 8462 of the fully-paid preference shares and 82,730 of the ordinary shares, that is roughly one sixth of the preference shares and one sixth of the ordinary shares. Those are held as part of the testator's residuary estate. The other five sixths of the shares are held by various other members of the company, and the remaining four fifths of the testator's shares are held by other members of the family or by trustees of settled shares. That being so, the appellant, Percy, asked to have his one fifth of the testator's shares transferred to him. This summons was taken out by the trustees, and they make no case upon the facts that it is expedient that they should be allowed to retain the shares for some longer time, but they rely in their defence upon a matter of law, their contention being that, having regard to the true construction of the will, they are entitled to retain the shares as long as they think fit. According to the language of the order of the learned judge now under appeal they are to be at liberty to retain the shares so long as they in their uncontrolled discretion think proper; that is that, although there may be some interests which will not become payable to persons sui juris for thirty or forty years, until every person is absolutely entitled under the trusts of the will, the trustees are at liberty to retain the shares of persons immediately and absolutely entitled. In my opinion the trustees have no such right, and the appellants are entitled to a transfer of their shares.

The power to postpone, according to the true construction of the clause, is a power to postpone conversion for a reasonable time, for the benefit of the estate. In addition to the power to postpone, there is power "to retain any shares stocks or securities of Marshall Sons and Company Limited or any other investments held by me at my death during any period without being liable for any loss arising thereby." So that if the trustees determine, after they have transferred to the appellants their proper proportion of the shares, to retain, in respect of the settled shares, these investments, they are to be at liberty to do so without being responsible for any loss. In my opinion, according to the true construction of the will, the power to postpone does not extend to an indefinite power of postponement so long as the trustees shall think fit. There has been no attempt to justify such a power on any facts peculiar to this case, or on any special circumstances relating to the company; the trustees merely claim as a matter of law the right to postpone for an indefinite period. In my opinion that claim cannot be upheld.

PHILLIMORE L.J. I do not see my way so clearly as the other members of the Court, but I agree in the result. The case of the trustees and the beneficiaries who oppose the claim of Percy J. Marshall to have his approximately one fifth share transferred to him has been rested on the power to retain given by the will. I think that this power cannot, per se, be relied upon as an answer to the appellants' request; the right to refuse to transfer is not given by this power. If there is such a right it rests upon the duty of the trustees to do their best for all the beneficiaries, it being their consequential duty to keep as large a block of shares as possible together so as to have large voting power, because it may be for the interests of some of the beneficiaries—such as tenants for life of settled estates—to keep the shares; and while they are kept it is very important that the policy of the company should be wisely directed, else the shares may be valueless. In certain cases I think this would be a true and sound reason for refusing the appellants' request, but in this case I agree that upon the balance of conflicting rights and interests there is not enough to deprive the appellants of their prima facie right.

Appeal allowed.

Solicitors: *R. F. & C. L. Smith, for Bescoby & Williamson, Retford; Johnson, Weatherall & Sturt, for Broomhead, Wightman & Moore, Sheffield.*

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[1912 P. 2365.]

Tenant for Life and Remainderman—Apportionment—Settlement comprising Guaranteed Debentures—Default in Payment of Principal and Interest—Liquidation of Guarantee Society—Scheme of Arrangement—Postponement of Claims for Principal—Interim Partial Payment of Interest—Capital or Income.

A testator gave his residuary personal estate upon trust for his two sons for life with remainder to their respective children or issue, and empowered his trustees to retain any securities upon which any portion of his estate might be invested. He further declared that the income, whether the retained investments were authorized or not, and whether of a permanent or wasting character, should be applied "as if the same were income arising from the proceeds of conversion, no part thereof being liable to be retained as capital." Part of the estate consisted of debentures of a company guaranteed by the Law Guarantee Society, Limited. Default had been made in payment of principal and interest of the debentures. In the winding up, under supervision of the Court, of the guarantee society a scheme of arrangement was sanctioned under which the time for payment of claims of creditors was postponed till December 31, 1918, and it was further provided that "in all cases of default in payment in full of interest on the debentures of any company down to" December 31, 1918, the liquidators of the society should pay or make up such interest to 3 per cent. per annum on the principal moneys secured by the debentures:—

Held, that the moneys received or to be received by the trustees of

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the will in respect of payments of interest at 3 per cent. under the scheme ought to be applied as income payable to the tenants for life, and not subject to apportionment.

Decision of Joyce J. reversed.

APPEAL from a decision of Joyce J.

Richard Pennington by his will dated in 1904 gave his residuary personal estate upon trust for his two sons for life with remainder to their respective children or issue. He gave his trustees power to retain any securities or investments upon which any portion of his personal estate might be invested, and by clause 21 of the will he directed as follows: "I declare that the net rents profits and income arising from my estate real and personal until the sale calling in and conversion thereof under the respective trusts in that behalf hereinbefore contained in whatsoever condition or state of investment the same may be and whether consisting of investments of an authorised character or not and whether of a permanent or wasting nature shall for all the purposes of this my will and as between all persons interested hereunder be applied from my death as if the same were income arising from the proceeds of such sale calling in or conversion or the investments of such proceeds no part thereof being liable to be retained as capital but no reversion or other property not actually producing income shall be treated as producing income for the purposes of this my will."

The testator died on July 13, 1910. Part of his residuary estate consisted of debentures bearing interest at 4½ per cent. in certain companies guaranteed as to capital and interest by the Law Guarantee Trust and Accident Society, Limited. These debentures were retained by the trustees under the above-mentioned power to postpone conversion. Some of the companies by which the debentures were issued subsequently made default in payment of capital, some in payment of interest, and some of both capital and interest. In December, 1909, the Law Guarantee Society went into voluntary liquidation, and the winding-up was now being conducted under the supervision of the Court.

On July 28, 1910, a scheme of arrangement under s. 120 of the Companies (Consolidation) Act, 1908, was sanctioned by an order of Neville J.

After providing for the realization of the society's assets and the investment of the proceeds, and for the application of assets from time to time in payment of working expenses, interest, and other items, the scheme provided:

"6. Time for payment of claims of creditors (except so far as above otherwise provided) in respect of principal moneys to be postponed until the 31st December, 1918. Provided always that nothing herein contained shall preclude the liquidators from making with the sanction of the Court a payment or payments on account to all the creditors of the society before the said date if in their judgment the progress of the liquidation permits of such a payment."

Clause 9 prescribed certain rules subject to which proofs were to be made by secured creditors. Sub-clause J. of that clause was as follows: "For the purpose of securing as far as possible equality of payment of interest as between the various creditors of the society the following further provision shall apply:— Where a security has been or shall be realised in whole or in part whether by the creditor or by the liquidators or otherwise and the proceeds of such realisation have been or shall be applied in paying or making up interest upon the principal moneys secured at a rate exceeding 3*l.* per cent. per annum the amount of such excess shall in the first instance be deducted from his claim but without prejudice to his rights under clause 19 (D) hereof."

Clause 12 provided: "As to holders of debentures guaranteed by the society the following provisions to be applicable in addition to those contained in clause 9 supra:—

"(A) Premiums payable under the trust deeds by the various companies who have issued debentures (including all premiums paid since the date of liquidation) not to form part of the general assets of the society but to be earmarked as between the debenture holders and the liquidators as forming part (but exclusive of the interest thereon) of the securities of the debenture holders respectively concerned.

"(B) Subject and without prejudice to the operation of clause 9 hereof the liquidators in all cases of default in payment in full of interest on the debentures of any company down to the 31st December, 1918, and on demand of the debenture holders' committee hereinafter mentioned shall pay or make up such interest to 3*l*. per cent. per annum on the principal moneys secured by the debentures if the holders thereof shall have received for any complete year (reckoned according to the terms of the debentures) less than that amount. Provided always that the liquidators shall not be required under this sub-clause to pay or make up such interest for any year prior to the last completed year before the date of such demand. If the security of the debenture holders of the company concerned has been valued and such value admitted the debenture holders concerned shall be entitled thereafter pro rata to 3*l*. per cent. per annum on the balance of the total claim of such debenture holders. Any sums payable under this clause to become due on the 30th June and the 31st December in each year and to be payable within one month thereafter in accordance with clause 2 and to be without prejudice to the rights of the debenture holders under clause 19 (D) hereof."

Clause 19 was as follows: The liquidators prior to the 31st December, 1918, to realise all assets belonging to the society and on the said date to apply the proceeds of such realisation in the manner and in the order of priority following:—

"(A) In payment of all sums (other than arrears of interest) then remaining payable under clause 2, sub-clauses (A), (B) and (C).

"(B) In payment pari passu of all arrears of interest on the principal moneys due to creditors at the rate of 3*l*. per cent. per annum and payable under clauses 3, 4, 5, 9, 11 and 12 hereof up to the 31st December, 1918.

"(C) In payment pari passu of the claims for principal moneys proved hereunder and admitted by the liquidators or adjudicated, provided that creditors who have received part of the principal moneys due to them under clauses 3 or 5 hereof shall not receive any further dividend until other creditors have been paid a similar proportion of their claims.

"(D) In payment pari passu of all arrears of interest payable by virtue of any written instrument at rates exceeding 3*l*. per cent. per annum.

"The surplus if any remaining after the above-mentioned payments have been made to be divided among the contributories of the company in accordance with their respective rights and interests therein."

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It appeared that only a portion of the debts of the Law Guarantee Society had yet been proved and that there were outstanding large liabilities insufficiently secured in respect of which proofs would probably be made before December 31, 1918, although the securities were now yielding to the creditors interest at the rate of at least 3*l.* per cent. It further appeared that income was at present being received by the liquidators from the assets already realized, more than sufficient to pay such interest at 3*l.* per cent. as was now payable under the scheme.

The only question calling for a report upon this appeal was how moneys received and to be received by the trustees or executors by way of interest at 3*l.* per cent. per annum under clause 12 (B) of the scheme of arrangement ought to be applied as between the tenants for life and the remaindermen under the will.

Joyce J. had held that the moneys so received or to be received ought to be apportioned between the persons interested in the income of the residuary personal estate of the testator and those interested in the capital thereof in the proportions which at the time of payment of any such sum the amount of interest then in arrear under the said debentures bore or should bear to the amount of principal then due thereunder.

Against this decision the tenants for life appealed. The notice of appeal asked for a declaration that all moneys received and to be received by the trustees or executors by way of interest at 3*l.* per cent. per annum under clause 12 (B) of the scheme of arrangement ought as between the tenants for life and remaindermen to be applied as income of the testator's estate.

Maugham, K.C., and *A. Adams*, for the appellants. Under the will of the testator these debentures were authorized investments and there was power to postpone conversion. Joyce J. has held that there must be an apportionment between tenant for life and remainderman according to the principle enunciated in *In re Atkinson.* (1)

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In the first place, we submit that the sums in question are to be treated as income because under the scheme the liquidators are bound to pay them as income, even although it is obvious that there may, and probably will, ultimately be a serious deficiency of assets. This interest is paid because the claim for principal is postponed until the end of 1918.

Again, there has been no realization in this case, and unless and until there is realization the rule of apportionment has no application. *In re Atkinson* (1) was a case where there had been realization. The testator knew that he had this security or property and treated it as a proper investment for his residue; it is favourable to the tenant for life, no doubt, but the testator has chosen to make it so. The payment is interest, made qua interest, and belongs to the tenant for life.

[PHILLIMORE L.J. Would income tax be payable in respect of it?]

A similar question arose in *Smith* v. *Law Guarantee and Trust Society* (2), and it was held that it was not payable; but the Court left open the question, which now arises, between tenant for life and remainderman. *In re Coaks* (3) was the case of an authorized investment and supports the appellants' contention.

These payments are treated throughout the scheme as payments of interest. If sums are treated as payments of interest as between creditors and the society under the scheme, they must be treated in the same way as between tenant for life and remainderman: *Bouch* v. *Sproule.* (4) These payments cannot be treated as interim dividends. They are really payments of interest to a small class of creditors in order to induce them not to make a claim until 1918. They are really payments of interest and must be treated as such. There is no authority for any apportionment at all.

T. T. Methold, for the respondents. These payments of interest may be made either out of capital or income, and they must eventually diminish the fund available for all the creditors. They are rather in the nature of dividends by way of interim distribution. The scheme is not binding upon all the beneficiaries under every settlement in which any of the debentures concerned may be comprised. The scheme has merely varied the rights of the parties concerned in the liquidation, and is no doubt binding as between the executors and the society, but as between beneficiaries under the will the ordinary rules, which prevail where bankruptcy or liquidation has supervened, must be applied. The scheme was not intended to be binding on persons not before the Court.

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(1) [1904] 2 Ch. 160.

(2) [1904] 2 Ch. 569.

(3) [1911] 1 Ch. 171.

(4) (1887) 12 App. Cas. 385.

W. Hunt, for the trustees.

A. Adams in reply. If the Court comes to the conclusion that under the scheme the payments are made as payments of interest, that binds the beneficiaries under the will. The testator having permitted the subject of his disposition to remain unconverted, all persons interested under the testator in the debentures are bound by the legal effect of his having done so. Consequently what is paid in respect of the debentures as interest must be treated as between tenant for life and remainderman as income.

Cur. adv. vult.

Nov. 19. Cozens-Hardy M.R. The question on this appeal turns upon the language of a scheme of arrangement under s. 120 of the Companies (Consolidation) Act, 1908. It is binding upon all the creditors of the Law Guarantee Society, including Pennington's executors. It does not follow the rules and principles of the bankruptcy law, and I think we are not justified in straining the language to bring it into accordance with the bankruptcy law.

Substantially the effect of the scheme is (1.) to postpone payment of principal moneys until December 31, 1918; (2.) to postpone payment of the full contractual interest until the same date, and even then to place it behind the payment of principal; and (3.) to pay 3 per cent. interest meanwhile, credit being given for such 3 per cent. in 1918, when full contractual interest is payable.

The question is whether, as between the tenants for life and the remaindermen under Mr. Pennington's will, the former are entitled to receive the interest at 3 per cent., having regard to clause 21 of the will. That clause, after authorizing

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postponement of conversion, said: "I declare that the net rents profits and income arising from my estate real and personal until the sale calling in and conversion thereof under the respective trusts in that behalf hereinbefore contained in whatsoever condition or state of investment the same may be and whether consisting of investments of an authorised character or not and whether of a permanent or wasting nature shall for all the purposes of this my will and as between all persons interested hereunder be applied from my death as if the same were income arising from the proceeds of such sale calling in or conversion or the investments of such proceeds no part thereof being liable to be retained as capital but no reversion or other property not actually producing income shall be treated as producing income for the purposes of this my will."

In my opinion the tenants for life are entitled. The 3 per cent. is not a general payment on account of the total debt, principal and interest. I am aware that the successive payments of 3 per cent. may diminish, or even exhaust, the money which would be available for payment of capital in 1918. That is often the operation of such a clause. There is no equitable rule which prevents full effect being given to the express language of clause 21.

The appeal on this point must be allowed.

Swinfen Eady L.J. The question is how the moneys received by the executors and trustees as interest at 3 per cent. per annum under clause 12 (B) of the scheme of arrangement of the Law Guarantee and Trust Society, Limited, ought to be applied as between tenants for life and remaindermen under the will of the testator.

It has been argued on the one hand that the sum so paid as interest at 3 per cent. is not really interest and income, but merely a payment which may be made by the liquidators either out of income or capital, and a payment which must diminish the fund ultimately available for payment of the claims of creditors; that it cannot be now stated even approximately what dividend is likely to be paid by the insolvent company on December 31, 1918, which is the date fixed by the scheme for the distribution of the company's assets; and that the payment of the 3 per cent. is more in the nature of interim distribution or dividend than in the nature of income.

On the other hand it is urged that the sum so paid is really income; that it is a payment made under the scheme as and for interest accrued subsequent to the date of the liquidation, and that it does not diminish in the least the amount of the proof; that the amount of the principal and interest due at the commencement of the winding-up remains the provable debt; and that although the interest payments diminish the funds ultimately available for distribution, the proof remains unaffected.

We are told that the position of the liquidation is that only a portion of the debts have yet been proved, and that there are large liabilities insufficiently secured, in respect of which proofs will probably be made before December 31, 1918, although the securities are now yielding to the creditors an income of 3 per cent. or upwards, and therefore it is not worth their while to prove at present. Now the testator's will contains clause 21. It has been read by the Master of the Rolls and I will not read it again.

We are further informed that at present the income being received by the liquidators from the funds already collected is more than sufficient to pay such interest at 3 per cent. as is now payable.

It must be borne in mind that the surplus income which is being accumulated increases the amount available to pay the debts proved.

Under these circumstances, and having regard to the clause in the testator's will, I am of opinion that the proper mode of dealing with the 3 per cent. interest is to allow it as income to the tenants for life under the will upon the footing that the whole of the dividend payable on December 31, 1918, up to the full 20*s*. in the pound on the proof, is to be attributable to capital, and not apportioned by reason of the postponement of payment until 1918. This decision will not affect any distribution under clause 19 (D) of the scheme, in respect of arrears of interest exceeding 3 per cent., if the assets of the Law Guarantee Society should ultimately prove to be sufficient to

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make any such payment. It is not intended to depart from the principle of *In re Atkinson* (1) in dealing with this question of interest; but the payments of interest at 3 per cent. in respect of a period since the commencement of the liquidation cannot properly be regarded as a dividend upon the amount of the proof at the date of the liquidation. According to the ordinary rule, on the insolvency of the company, the amount of the proof would be limited to the principal and interest up to the commencement of the liquidation; this amount must first receive 20*s.* in the pound before any payment can be made in respect of subsequently accrued interest. To such a case the principle of *In re Atkinson* (1) can readily and directly be applied. In the present case, however, under the scheme sanctioned by the Court, subsequent interest at 3 per cent. is to be paid up to 1918, with a view of giving ample time for the realization of the assets for the benefit of all concerned, and the fairest method of apportionment is to treat the 3 per cent. as income, and the whole dividend ultimately paid on the proof as capital, increased though it may be by the delay, at the expense of the tenants for life.

PHILLIMORE L.J. I also am of the opinion that the appeal should succeed. The scheme is a peculiar arrangement, a special one of its kind. By it a number of creditors having interest-bearing debts due to them have agreed inter se and with their debtor, the Law Guarantee Trust and Accident Society, Limited, to receive less interest than they were entitled to and to undertake not to call in their principal until December 31, 1918.

The 3 per cent. which the creditors are in the meanwhile to receive is not part payment of principal, but a reduced rate of interest. This being so, the case of *In re Atkinson* (1) does not apply, and there is no reason why where the chose in action has been settled an artificial construction should be put upon the scheme in order to modify the position as between tenant for life and remainderman.

Solicitors: *Pennington & Son.*

G. A. S.

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(1) [1904] 2 Ch. 160.

GOLDFOOT *v.* WELCH.

[1913 G. 838.]

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Landlord and Tenant—Demise of Room—Right to Outside Wall—Evidence.

A demise in writing of the "rooms situate on the first and second floors" of business premises,

Held, in the absence of context to the contrary, to include the external walls of the two floors.

Carlisle Café Co. v. *Muse Brothers & Co.* (1897) 67 L. J. (Ch.) 53; 77 L. T. 515, and dictum of Joyce J. in *Hope Brothers, Ld.* v. *Cowan* [1913] 2 Ch. 312, followed.

Held, also, that parol evidence that the external walls were to be excluded from the demise was not admissible.

Semble, in *Carlisle Café Co.* v. *Muse Brothers & Co.* Byrne J. determined that, in the absence of context to the contrary, the demise of a room includes the external walls of the room.

WITNESS ACTION.

By a memorandum of agreement dated February 10, 1913, between George Fowler Welch, the defendant, and Jacob Goldfoot, the plaintiff, the defendant agreed to let and the plaintiff to take "all those rooms situate on the first and second floors of the business premises known as No. 41 High Street Notting Hill Gate in the Royal Borough of Kensington in the county of London together with the exclusive use of the side entrance door and staircase leading to the demised rooms" for a term of one year from March 1, 1913, at an annual rent. The tenant agreed (inter alia) as follows: "(2.) to leave the interior of the demised rooms in a reasonably" (*sic*) "state of repair and condition (fair wear and tear and accidental damage by fire and tempest excepted) and so deliver up at the expiration of the said tenancy, (3.) to use the premises only for the profession of a dental surgeon or if the tenant should at any time desire to let one room the undertenant shall carry on no objectionable trade or business that may in any way form a breach of the covenants of the lease under which the premises are held" (N.B. the defendant held under a lease expiring in 1919), "(4.) to permit the landlord at reasonable times of the day by himself or with his agent or workmen to enter and inspect the state of repair and condition of the premises and to execute any structural repairs that may be necessary," (5.) not to assign or underlet the premises without consent from the landlord, " (6.) not to exhibit upon the premises any form of advertisement other than those relative to the profession of a dental surgeon," and (9.) that the tenant should have the option of continuing his tenancy of " the demised rooms " for a term of three or five years after the expiration of the one year's tenancy. It was further agreed that if the rent should be in arrear for fourteen days or there should be any breach of the agreements on the part of the tenant therein contained the landlord might re-enter " on the premises " and thereupon the tenancy should cease. The landlord agreed that the tenant paying the rent and observing the agreements on his part contained might peaceably hold " the premises " without interruption from the landlord or any person claiming under him.

The plaintiff took possession of the premises on March 1, 1913, and practised dentistry there as the Anglo-American Dental Company. He advertised by means of adhesive white letters and figures attached to the windows of the premises facing the High Street. He claimed to be entitled to the possession and use of the outside walls of the rooms subject only to the restrictions as to advertising of clause 6 of the agreement, and that the defendant was not entitled to them except for purposes connected with maintenance and repair.

On or about April 24, 1913, the defendant in derogation, as the plaintiff alleged, of his own grant affixed or authorized to be affixed to the outside wall facing the High Street two large boards on either side of the plaintiff's window on the second floor, upon each board being an advertisment of Lipton's tea or cocoa. The plaintiff requested the defendant to remove the advertisements, but he refused.

The plaintiff thereupon brought this action claiming an injunction to restrain the defendant from interfering with his possession of the external walls, and a mandatory injunction to remove the advertisements.

The defendant by his defence alleged that on or about February 4, 1913, at an interview between the plaintiff and the defendant on the footway outside No. 41 it was verbally agreed between the plaintiff and the defendant that the defendant should have the right to let the outside walls of the rooms comprised in the demise in order that advertisements might be affixed thereon, or, in the alternative, that at the interview the defendant expressly reserved to himself from the demise the right to let the outside walls; and that by reason of the verbal agreement or reservation, and on the true construction of the written agreement, the plaintiff was not entitled to the possession and use of the outside walls of the rooms and that the defendant was.

Cozens-Hardy, *K.C.*, and *W. F. Swords*, for the plaintiff. The question is primarily the construction of the agreement. Where there is a demise of a flat or rooms on a first or second or other upper floor, there is by implication of law an inclusion of the outside walls, in the absence of any exception or reservation or context to the contrary: *Hope Brothers, Ld.* v. *Cowan* (1); *Carlisle Café Co.* v. *Muse Brothers & Co.* (2) On the construction of this particular agreement the plaintiff is entitled to the possession and use of the outside walls except so far as he is restricted by clause 6.

Clayton, *K.C.*, and *Owen Thompson*, for the defendant. The agreement is not free from ambiguity. It does not tally with either of the cases cited by the plaintiff. It is not the case of letting a floor, but of letting a room with admission by a side door and staircase. The plaintiff can advertise his practice by means of notices posted on the inside of his window panes, which is a more usual way for a surgeon to advertise than on outside walls.

Parcels are always a matter of identity, which can be determined by parol evidence and surrounding circumstances: *Doe* v. *Burt.* (3) "Parcel or no parcel is always a question of evidence for a jury": per Best C.J. in *Press* v. *Parker* (4), quoting Lord Ellenborough. The defendant's case may be put on all or any of three grounds, antecedent agreement that the external walls should not be included, express reservation of them from the demise, or identification of parcels which will shew they are excluded. Evidence of these is admissible.

(1) [1913] 2 Ch. 312.

(2) 67 L. J. (Ch.) 53; 77 L. T. 515.

(3) (1787) 1 T. R. 701.

(4) (1825) 2 Bing. 456, 459.

[EVE J. I will hear the evidence without prejudice to the plaintiff's objection that it is not admissible.]

(Evidence was called.)

[EVE J. I think there was no parol agreement. But was there an express reservation?]

Yes.

In *Hope Brothers, Ld.* v. *Cowan* (1) Joyce J. says (2): "I am of opinion that, unless there be an exception or a reservation or something in the context to exclude it, prima facie where there is a demise of a floor or a room or an office bounded in part by an outside wall, in that case the premises demised comprise both sides of the wall." That means only that there is a presumption that the outside wall is included, but the presumption may be rebutted. "Prima facie" as used by Joyce J. is, if properly understood, really the strength of the defendant's case. The word "room" does not of itself connote an outside wall, though it may "prima facie." The rebutting context in this case is the fact, inter alia, that the plaintiff was informed by the defendant that the outside walls were not available for letting to him. *Doe* v. *Burt* (3) shews that evidence is admissible for the purpose of shewing what are the true contents of the particular agreement. Where an intending tenant is told beforehand that external walls are not available, "room" must have a more limited meaning than it might otherwise have.

Cozens-Hardy, K.C., in reply. The evidence is not admissible, and, even if it is, it amounts to nothing and makes no case for the plaintiff to answer. The evidence is tendered to contradict a written document. There is no doubt about the law, as to which there is a clear current of authority, that evidence is not admissible to contradict a written document: *Meres* v. *Ansell* (4); *Doe* v. *Webster* (5); *Barton* v. *Dawes* (6); *Henderson* v. *Arthur*. (7) In *Doe* v. *Burt* (3) the evidence was not such as would contradict the clear statement of the deed.

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(1) [1913] 2 Ch. 213.

(2) [1913] 2 Ch. 317.

(3) 1 T. R. 701.

(4) (1771) 3 Wils. 275.

(5) (1840) 12 Ad. & E. 442.

(6) (1850) 10 C. B. 261.

(7) [1907] 1 K. B. 10.

Clayton, K.C., in reply on the cases. The authorities cited by the defendant lay down a perfectly simple rule, namely, that, where there is no ambiguity, evidence is not admissible. That is not contested, but is not the case here. It cannot be said that the letting of these rooms is free from ambiguity or that, unequivocally, it includes the outside wall. What Joyce J. was dealing with in *Hope Brothers, Ld.* v. *Cowan* (1) was an office, though he uses the word "room." What he says, therefore, is for the purposes of this case merely dictum.

Eve J. By an agreement in writing dated February 10, 1913, the defendant demised to the plaintiff "all those rooms situate on the first and second floors of the business premises known as No. 41 High Street Notting Hill Gate in the Royal Borough of Kensington in the county of London together with the exclusive use of the side entrance door" and so on. I need not read further.

I think on the authorities apart from anything in the document itself to limit or control the demise, it includes the external walls of the first and second floors. I say that because, although in *Hope Brothers, Ld.* v. *Cowan* (1) Joyce J. was dealing with an office and not with a "room" so described, in *Carlisle Café Co.* v. *Muse Brothers & Co.* (2) Byrne J. had to construe a demise of a studio and a reception room. It is true that in the latter case there were circumstances outside the question of construction which led Byrne J. to the decision at which he arrived, but it is clear from the arguments as reported that the point was raised whether the demise of the room included only so much cubic space as the walls enclosed or whether it included also the external walls, and I read the judgment of Byrne J. as determining that in the absence of any context to the contrary the demise of a room includes the external walls enclosing the room. Before considering how far anything outside the agreement itself can be looked at to control the effect of the demise, it must first be ascertained whether there is anything in the agreement itself to limit—I will not say its "prima facie" construction—but the construction which it properly bears in

(1) [1913] 2 Ch. 312. (2) 67 L. J. (Ch.) 53; 77 L. T. 515.

the absence of a contrary intention to be gathered from the context. Mr. Clayton on behalf of the defendant has laid hold of every conceivable point to support his argument that the external walls are not here included—amongst other observations he says that one cannot conceive the landlord entering upon the external walls to view their condition or the plaintiff exercising his profession of a dentist upon the external walls. But in my opinion all those arguments are more than counterbalanced by the sixth clause of the agreement by which the tenant agrees "not to exhibit upon the premises any form of advertisement other than those relative to the profession of a dentist." So far from there being anything in the context to limit or control the demise, it seems to me to go a long way in support of the contention that the parties throughout intended and contemplated that the external walls would be included.

Two defences are raised on the pleadings, the one that there was an agreement antecedent to or contemporaneous with the demise to the effect that the defendant should have the right to use the external walls and that the tenant should not have the right to use them, the other that there was an express reservation from the demise of the external walls. The evidence which I thought it better to hear, though it was objected to, falls short of establishing either of those two defences. All it amounts to is this—that the defendant some days before the agreement was entered into told the plaintiff that it was then out of his power to let him the front wall, but seeing that he subsequently executed a document which includes the wall, this comes to nothing. But had the evidence gone to establish that the walls were reserved out of the demise by parol, could I have properly admitted it? I do not think I could. Having arrived at what I think to be the true construction of the agreement, I am of opinion that no evidence to contradict it was admissible.

I therefore hold that the plaintiff is entitled to the mandatory injunction which he claims and to the costs of the action.

Solicitors: *Howard & Shelton; Harford & Harford.*

A. L.

In re WILLIAMS.
METCALF *v.* WILLIAMS.

[1913 W. 2646.]

SARGANT J.
1913
Nov. 18, 26.

Will—Construction—Words of Futurity—Gift to Children of Child of Testator who "shall die in my lifetime"—Child dead at Date of Will leaving Children.

A testator gave the sum of 250*l.* to two grandchildren, J. and G., children of his son P., and he gave his residuary estate "in trust for all my children living at my decease who, being . . . . sons, shall attain the age of twenty-one years, or, being daughters . . . . shall attain that age or marry, in equal shares . . . . Provided always, that if any child of me shall die in my lifetime leaving . . . . children who shall survive me, and being . . . . sons shall attain the age of twenty-one years, or, being . . . . daughters, shall attain that age or marry, then and in such case the last mentioned . . . . children shall take . . . . equally . . . . the share which . . . . their parent would have taken . . . . if such parent had survived me and attained the age of twenty-one years." P., to the knowledge of the testator, was dead at the date of the will. The other children of the testator and also J. and G. survived him, and some of the children had attained twenty-one at the date of the will:—

Held, that J. and G. on attaining twenty-one or marriage took the share in the residue which P. would have taken if he had survived the testator and attained twenty-one.

Loring v. *Thomas* (1861) 1 Dr. & Sm. 497; *Barraclough* v. *Cooper* [1908] 2 Ch. 121, n.; *In re Lambert* [1908] 2 Ch. 117; and *In re Metcalfe* [1909] 1 Ch. 424, followed.

Christopherson v. *Naylor* (1816) 1 Mer. 320; *In re Cope* [1908] 2 Ch. 1; *In re Musther* (1890) 43 Ch. D. 569; and *Ive* v. *King* (1852) 16 Beav. 46, distinguished.

Philip Williams, by his will, dated June 12, 1900, directed payment of his just debts and funeral and testamentary expenses, and bequeathed the sum of 250*l.* to his grandchildren Philip John Williams and Grace Elizabeth Williams, children of his son Philip Parfitt Williams, equally, share and share alike, should they attain the age of twenty-one years; and he directed that if either of them should die before attaining twenty-one the survivor should be entitled to the whole of the said sum of 250*l.*, and that in the event of both of the said children dying before attaining twenty-one the said sum should fall into residue and form part of the testator's residuary estate. The testator then gave, devised, and bequeathed all the residue of his estate to trustees, upon trust for conversion and payment of his debts and funeral expenses, and to invest the residue and hold the same "In trust for all my children living at my decease who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, in equal shares, and, if there shall be only one such child, the whole to be in trust for that one child. And I declare that the share of each of my daughters shall be for her separate use and free from the control of any husband with whom she may intermarry. Provided always, that if any child of me shall die in my lifetime, leaving a child or children who shall survive me, and, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, then and in such case the last mentioned child or children shall take (and if more than one equally between them) the share which his, her, or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of twenty-one years."

The testator died on November 29, 1903, having had three sons and five daughters only. All the daughters survived him. One son, Philip Parfitt Williams, died in 1899, and the testator was shewn to have known of his death at the time when the will was made. The other two sons survived the testator.

Philip P. Williams left two children, the above-named Philip John Williams and Grace Elizabeth Williams, and in 1910 a distribution of the residuary estate or part of it was made on the footing that these two grandchildren were not entitled to participate in it. A beneficiary under the will having proposed to raise money on a mortgage of her share of residue, the proposed mortgagee raised the question whether P. J. Williams and Grace E. Williams were not entitled to share in the residue contingently on the former attaining twenty-one and the latter on attaining that age or marrying. Some of the children who had benefited by the view taken as to how the estate should be distributed took out an originating summons, to which P. J. Williams and Grace E. Williams were defendants, raising the same question.

Percy Wheeler, for the plaintiffs. As Philip Parfitt Williams died before the will was made and the gift to grandchildren is only to the children of any child of the testator who "shall" die in his lifetime, neither of the defendants can take. The words only refer to children of a child of the testator dying in his lifetime and after the date of the will: *Christopherson* v. *Naylor* (1); *In re Musther* (2); *Gorringe* v. *Mahlstedt* (3); *In re Cope.* (4) The fact that the gift to children of a deceased child is contained only in a proviso to the original gift to the testator's children, and not in an independent or principal clause of the will, is in favour of the construction contended for.

Owen Thompson, for the defendants. The defendants take the share which their father would have taken if he had survived the testator. The two classes of cases to be considered require to be clearly distinguished. One of these deals with cases of true substitution, like *Christopherson* v. *Naylor* (1) and the other authorities cited. The other deals with cases in which a testator creates a hypothetical class which is constituted of parents who would have taken if living, but for whom, as they are dead, the testator has substituted their children. In this kind of case there can be no true substitution, but only a hypothetical one, and *Loring* v. *Thomas* (5) applies. In that case it was held that the words "shall die" did not import future dying, but were equivalent to "shall be dead" or "shall have died." The defendants do not take by way of substitution, but by an alternative or substantive gift.

[SARGANT J. referred to the argument to that effect in *Loring* v. *Thomas.* (6)]

The decision in that case was approved by the House of Lords in *Barraclough* v. *Cooper* (7), and has been followed in *In re Potter's Trust* (8), *In re Lambert* (9), and *In re Metcalfe.* (10) In *Gorringe* v. *Mahlstedt* (3) there was no substitutional gift in case of children failing to attain the age of twenty-one years.

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(1) 1 Mer. 320.
(2) 43 Ch. D. 569.
(3) [1907] A. C. 225.
(4) [1908] 2 Ch. 1.
(5) 1 Dr. & Sm. 497.
(6) 1 Dr. & Sm. 506.
(7) [1908] 2 Ch. 121, n.
(8) (1869) L. R. 8 Eq. 52.
(9) [1908] 2 Ch. 117.
(10) [1909] 1 Ch. 424.

In re Musther (1), like *Christopherson* v. *Naylor* (2), is an example of true substitution. [He also referred to Theobald on Wills, 7th ed. p. 674.]

Percy Wheeler in reply. If *Loring* v. *Thomas* (3) is in point, it is disposed of by *Gorringe* v. *Mahlstedt* (4), which was decided after *Barraclough* v. *Cooper*. (5) *In re Potter's Trust* (6) was discussed and distinguished in *In re Hotchkiss's Trusts*. (7)

Cur. adv. vult.

Nov. 26. SARGANT J. The question here raised is whether an original gift in the will of the testator to the children of any child of his who should die in his lifetime operates in favour of the children of a child who had, to the knowledge of the testator, died before the date of the will. In more technical language the point may be stated as being whether the will falls within the decision in *Christopherson* v. *Naylor* (2) and *Gorringe* v. *Mahlstedt* (4), or within those in *Loring* v. *Thomas* (3) and *Barraclough* v. *Cooper*. (5) Of course, in stating the questions in this way, I do not propose to follow the fallacious course, so often deprecated, of looking at the authorities first and then seeing how this will differs from them. I propose to examine the will first, and put my own interpretation on it, and then to see whether there is any principle to be derived from the cases which renders it necessary for me to qualify or alter that interpretation.

The testator had a large family consisting of three sons and five daughters. The eldest son, Philip Parfitt Williams, had married, rather out of his rank in life (for to this extent I think I may look at the statements in the affidavit of Mrs. Metcalf), and had died in July, 1899, leaving two children who are still infants. The other two sons and five daughters were living at the date of the testator's will and survived him. I gathered during the argument, and especially from the fact of the youngest child having attained twenty-one by the year 1910, that some or one of these seven children had by the month of June, 1900, attained the age of twenty-one years, and this is a fact to which, as will hereafter be seen, I attach some importance in construing the will. Inasmuch, however, as this fact is not strictly proved, I will give an opportunity to the plaintiffs before the order is drawn up of filing evidence to shew, if this is the fact, that none of these seven children had attained twenty-one at the date of the testator's will; and, if such evidence is filed, I will reconsider my decision. (1)

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(1) 43 Ch. D. 569.
(2) 1 Mer. 320.
(3) 1 Dr. & Sm. 497.
(4) [1907] A. C. 225.
(5) [1908] 2 Ch. 121, n.
(6) L. R. 8 Eq. 52.
(7) (1869) L. R. 8 Eq. 643.

The will bears date June 12, 1900, and the material portions thereof are as follows. The testator bequeaths the sum of 250*l.* to his grandchildren Philip John Williams and Grace Elizabeth Williams, children of his son Philip Parfitt Williams, equally, share and share alike, should they attain the age of twenty-one, and then provides that if either of them dies under twenty-one years of age the share of that one shall go to the other one. Then he gives his residue on trust for sale and conversion, and directs that it shall be held upon trust expressed in the following words: "In trust for all my children living at my decease who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, in equal shares, and, if there shall be only one such child, the whole to be in trust for that one child. And I declare that the share of each of my daughters shall be for her separate use and free from the control of any husband with whom she may intermarry. Provided always, that if any child of me shall die in my lifetime, leaving a child or children who shall survive me, and, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, then and in such case the last mentioned child or children shall take (and if more than one equally between them) the share which his, her, or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of twenty-one years."

The question is whether the proviso I have read applies to and brings in, as objects of the testator's bounty, not only the children of a child who should die between the date of his will and the date of his death, but also the children of any child of his who was already dead. I should perhaps mention that a distribution, though not I think a complete distribution, has already taken place upon the footing that the latter class of grandchildren cannot take. But there is no reason to think that this cannot readily be put right, if necessary; and, indeed, the children of the testator who have benefited by this view, or most of them, are amongst the plaintiffs who are raising the question.

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(1) At the conclusion of the judgment, counsel stated and His Lordship was satisfied that some of the testator's children had attained the age of twenty-one years at the date of his will.

In the first place, it is obvious that the words in the proviso "any child of me" are in themselves words which apply to and denote every child of the testator, whether living or dead at the date of the will. But there are said to be two indications in the will to restrict the prima facie meaning of these words and limit them to children living at the date of the will, namely, first, the use of words of futurity, "shall die"; and, secondly, the circumstance that the gift to children of a deceased child is contained, not in an independent or principal clause, but in a proviso to the original gift to the testator's children. As regards the first point, it is observable that in the trust preceding the proviso the words "shall attain the age of twenty-one years," and the words "shall attain that age or marry," include, on the view I have taken of the facts, children who had attained the age of twenty-one at the date of the will, for it is admitted on behalf of the plaintiffs, and indeed forms part of the title of some of them, that the future attainment of twenty-one by the testator's own children was not a necessary qualification for taking. If, therefore, "shall" includes "shall have" in this gift, that is strong reason for holding that it includes the past as well as the future in the second gift. And, indeed, it seems to me even easier to explain any suggestion of futurity in the second gift, for what the testator is really contemplating here is, not merely the death of a child in his lifetime, but the death of such a child leaving issue who fulfil certain conditions and survive the testator. And part at least of the complex event here contemplated was necessarily future. Further, it seems to me reasonably clear that in the proviso itself the words "shall attain the age of twenty-one years" must be read as including a past attainer of that age. For if at the date of the will grandchildren of the testator had already attained twenty-one, and their parent should afterwards predecease the testator while they survived him, it would, in my judgment, be hopeless to contend that these grandchildren would not take the share which their parent would have taken if himself surviving. The fact is that, in gifts to a class, some of whom have still to qualify, words of futurity may easily be used as to the whole class although some of the members have already qualified. On this point the remarks of Lord Lindley in *Barraclough* v. *Cooper* (1) are quite general, and are the more valuable on that account. And it may be remarked that in *In re Cope* (2) the converse construction obtained, that is to say the words "have attained," which, very strictly construed, referred to the past, were read as equivalent to "shall have attained" or "to have attained" or "shall attain," so as to let in children who attained the age of twenty-one years subsequently to the date of the will.

The second argument for the narrower construction of the clause in question is that it is in terms expressed as a proviso. This, in my judgment, is of little or no materiality if in fact it operates otherwise. Now here the clause, though expressed as a proviso, cannot, on either of the interpretations contended for, operate by way of limitation or qualification of the preceding gift, that is by way of proviso, strictly speaking. In either case, it does not cut out members of the original class and introduce members in their place into the class by way of substitution, but augments the first class by introducing into it new members by way of original gift, and the only question is how many new members are so introduced. This argument, therefore, in my judgment, also fails. Further, the fact that the testator has given two small legacies of 250*l.* each to the two children of Philip Parfitt Williams, contingently on attaining the age of twenty-one years, does not, in my opinion, offer any real indication that they were intended to be excluded from such interest in the residue as they might otherwise have taken under the general language of the gift and proviso in question.

(1) [1908] 2 Ch. 121, n.

(2) [1908] 2 Ch. 1.

I will now deal quite shortly with the cases. *Loring* v. *Thomas* (1), *Barraclough* v. *Cooper* (2), and other like decisions are cases which deal with original gifts. *Christopherson* v. *Naylor* (3), *Gorringe* v. *Mahlstedt* (4), and other like decisions are cases dealing with gifts which, though not strictly substitutional, have many of the elements of substitution, inasmuch as they contain indications that the second class of takers are only to take something which their propositus was intended to take or was contemplated by the testator as being capable of taking. *In re Cope* (5), on the other hand, and *In re Musther* (6) appear to me to be, like *Ive* v. *King* (7), cases of pure substitution in the place of members of a class who may drop out. (See Hawkins on Wills, pp. 249 to 251.) The present is obviously not a case of pure substitution like *Ive* v. *King*. (7) Nor do I think that it is even a case of partial substitution like *Christopherson* v. *Naylor* (3), for I can find no sufficient indication that the gift to grandchildren in the proviso was of something which their parent was intended to take or was contemplated as having been capable of taking. I cannot myself differentiate the present case on principle from the case of *Loring* v. *Thomas* (1), and, indeed, I think that the present case is a stronger case than *Loring* v. *Thomas* (1) for including children of a child dead at the date of the will. Further, the present case is, in my judgment, really indistinguishable in essentials from those of *In re Lambert* (8) and *In re Metcalfe* (9); and, even if my own opinion had been to the contrary, I should have felt the greatest difficulty in differing from those decisions and so introducing a fresh complication into an already sufficiently complicated subject.

Accordingly, I propose to declare that upon the true construction of the will the defendants Philip John Williams and Grace Elizabeth Williams, the children of Philip Parfitt Williams, are contingently entitled, on attaining the age of twenty-one years or in the case of the defendant Grace Elizabeth Williams previously marrying, to the eighth share in the residuary trust funds in the will mentioned which their parent Philip Parfitt Williams would have taken if he had survived the testator.

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(1) 1 Dr. & Sm. 497.
(2) [1908] 2 Ch. 121, n.
(3) 1 Mer. 320.
(4) [1907] A. C. 225.
(5) [1908] 2 Ch. 1.
(6) 43 Ch. D. 569.
(7) 16 Beav. 46, 53.
(8) [1908] 2 Ch. 117.
(9) [1909] 1 Ch. 424.

Solicitors for all parties: *Kinch & Richardson, for Lloyd & Pratt, Cardiff.*

F. E.

In re DE CRESPIGNY'S SETTLED ESTATES.

[1913 D. 936.]

ASTBURY J.
1913
Dec. 10.

Settled Land—Improvements—Authorized Improvement—Necessary ancillary Improvement—Conversion of Land into Building Land—Estate Office—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 25.

The building of an estate office on settled land, though not an improvement per se within the improvement clauses of the Settled Land Act, 1882, s. 25, may in a proper case be allowed under the general words of the section as an "operation incident to, or necessary, or proper . . . . for securing the full benefit of" an authorized improvement, e.g., the conversion of land into building land under clauses 17 and 18.

In re Lord Gerard's Settled Estate [1893] 3 Ch. 252, distinguished.

ORIGINATING SUMMONS.

This was an application by the life tenant in possession of the above estates that the trustees of the settlement for the purposes of the Settled Land Acts might be authorized to expend out of capital moneys in their hands the sum of 200*l.* upon the construction of an estate office on part of the settled estates as proposed in a scheme submitted to the trustees and dated June 28, 1913.

Part of the settled estates was situate in Camberwell and comprised about 900 houses and shops of which about sixty-three were let at rack rents amounting to 3400*l.* a year and the remainder on long leases at ground rents amounting to 4700*l.* a year. There were no buildings unlet. There was also a large piece of vacant land at present used as a cricket and tennis ground. This was ripe for immediate development as a building estate. It had been valued under the Finance (1909-10) Act, 1910, at 24,750*l.* It was proposed to develop it as a building estate.

The rack-rent houses were old buildings mostly let on non-repairing leases or agreements and from time to time requiring expenditure on structural work, to enable the same to be let. The houses let at ground rents were also old buildings. The leases would fall in between 1919 and 1950, when structural alterations would be necessary to enable the same to be let.

For the purpose of negotiating and superintending the development or sale of the vacant land and the structural alterations in buildings it was necessary that there should be an estate agent at hand on the estate, and as there were no unlet buildings it was necessary to build him an office.

The life tenant accordingly submitted to the trustees a scheme for a single storey building to be used as an estate office. It consisted of two rooms and a lavatory, but did not contain accommodation for residence. The site of the proposed office was not on the vacant land, but upon a more convenient plot near the railway station which was at present unoccupied and unproductive. This plot was unsuitable for the erection of dwelling-houses, but highly suitable for the proposed office, which would last about 200 years and be of permanent value to the estate.

Percy Vaughan, for the life tenant. Sect. 25 of the Settled Land Act, 1882, provides that improvements authorized by the Act are (*a*) the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and (*b*) any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes. In other words the section authorizes (*a*) specified improvements and (*b*) any operation incident to or necessary or proper for securing the full benefit of those improvements.

The specified improvements are contained in twenty clauses of which the first fifteen apply to agricultural land and the last two to mines, while clause 16 applies to markets and market places presumably anywhere. The other two clauses are as follows:—

Clause 17. "Streets, roads, paths, squares, gardens, or other open spaces . . . . the same being necessary or proper in connexion with the conversion of land into building land."

Clause 18. "Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid."

The conversion of the vacant land into building land is clearly within clauses 17 and 18 and is specifically justified as an improvement per se under clause (*a*). The building of the estate office is not an improvement per se, but it is justified under clause (*b*) as an operation incident to, necessary, and proper for securing the full benefit of the specific improvement.

In *In re Houghton Estate* (1) Bacon V.-C. apparently treated the enlargement and improvement of a farmhouse in which the agent was living as an improvement per se within clause 11, "Farmhouses," but the decision is not in point in the present case, and if and so far as it authorized the building of a new agent's house as an improvement per se it was disapproved in *In re Lord Gerard's Settled Estate.* (2) In that case it was proposed to expend 750*l.* on building a private house for the residence of an agent of an agricultural estate. It was sought to justify this as an improvement per se under clause 10, "Cottages for labourers, farm servants, and artisans," and clause 11, "Farmhouses, offices, and outbuildings, and other buildings for farm purposes." This naturally failed. The present point did not arise, as it was not suggested that the agent's house was incident to any of the other proposed improvements, which were all in fact disallowed.

Carden Noad, for the life tenant in remainder. The main point of the decision in *In re Lord Gerard's Settled Estate* (3) was that the Settled Land Act, 1882, was a code in itself, and was not to be construed by reference to *Drake* v. *Trefusis* (4) and other decisions as to the application of capital money under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). The new agent's house was clearly not an improvement per se within the Settled Land Act, 1882, and that point was only faintly argued.

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(1) (1885) 30 Ch. D. 102.

(2) [1893] 3 Ch. 252, 259, 263.

(3) [1893] 3 Ch. 252, 257.

(4) (1875) L. R. 10 Ch. 364.

The only cases really in point on the present application are *In re Orwell Park Estate* (1) and *In re Earl De La Warr's Settled Estates.* (2) In *In re Orwell Park Estate* (1) the life tenant wished to expend 1190*l.* capital for laying out a cricket ground and 600*l.* for building a cricket pavilion. He contended that the pavilion was within "the first part of s. 25" and clause 18 as being a necessary and proper work in connection with the ground and "for securing the full benefit thereof." Swinfen Eady J. held that the building of the pavilion was not part of the laying out and he was quite unable to regard it as necessary to the cricket ground or an authorized improvement under the Act. On the other hand in *In re Earl De La Warr's Settled Estates* (2) the evidence shewed that except on public commons a golf course without a pavilion would scarcely bear contemplation, and Eve J. on being asked to sanction an expenditure of 1610*l.* on the course and 2500*l.* on the pavilion sanctioned 6000*l.* for the two combined.

It is, of course, a matter of evidence in each case whether the additional improvement, though not an improvement per se, is incident to, necessary, or proper for securing the full benefit of the authorized improvement, and in this case the evidence is clear.

Percy Wheeler, for the trustees. We should have consented to the scheme as a matter of course, but we were not quite sure that it came within s. 25. The Act, however, should not be construed narrowly—*In re Earl of Dunraven's Settled Estates* (3)—but in a spirit of wise and reasonable liberality—*In re Mundy and Roper's Contract* (4)—and if so construed this expenditure is clearly justifiable.

ASTBURY J. This is an application by the life tenant of a settled estate for the Court's sanction to the construction of an estate office out of capital money.

(1) (1904) 48 Sol. J. 193.

(2) [1911] W. N. 171.

(3) [1907] 2 Ch. 417, 421.

(4) [1899] 1 Ch. 275, 289.

There is a large plot of vacant land which it is proposed to convert into building land and there is no house or other erection on the estate available for an office in which the work of the estate can be looked after and the accounts kept. The evidence proves the necessity of such an office, and the question is whether it can be provided out of capital.

The improvements authorized by s. 25 of the Settled Land Act, 1882, do not include building a house for the residence of an estate agent in the ordinary way.

The first fifteen sub-clauses refer chiefly to agricultural land. Clause 16 authorizes markets and market places and clauses 17 and 18 authorize a large number of works in connection with the conversion of land into building land.

Sect. 25, however, not only authorizes the making or execution "of any of the following works, or of any works for any of the following purposes," i.e., the works and purposes mentioned in the various sub-clauses, but it also authorizes "any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes."

In *In re Mundy and Roper's Contract* (1) Chitty L.J., after stating that the broad policy of the Act was to render land marketable by striking off the fetters of settlement and conferring on life tenants large powers of dealing with the land by way of sale, exchange, lease, and otherwise, said that the Act ought "to be construed by the Court with regard to those broad principles and in a spirit of wise and reasonable liberality."

I have been referred to several authorities. In *In re Houghton Estate* (2) Bacon V.-C. allowed a large sum for enlarging and improving an agent's house on an agricultural estate. He evidently allowed this as an improvement per se, there being no suggestion that it was incident to, necessary, or proper for securing the full benefit of any of the other improvements in the scheme which he authorized.

In *In re Lord Gerard's Settled Estate* (3) the decision of

(1) [1899] 1 Ch. 275, 289.

(2) 30 Ch. D. 102.

(3) [1893] 3 Ch. 252, 259.

Bacon V.-C. was disapproved. In that case it was proposed to build a residence for the agent of an agricultural estate. It was not suggested that this was incident to, necessary, or proper for securing the full benefit of any other authorized improvement, but it was put forward as an improvement per se. Lindley L.J., after referring to *In re Houghton Estate* (1) and pointing out that Bacon V.-C. evidently thought the agent's house was a farmhouse in which the agent lived, said: "Of course, if that were so—if the agent's house was a farmhouse in which the agent was living—there is no difficulty about it; but if the agent's house in that case was what the agent's house in this case is to be—if the Vice-Chancellor meant to go that length—then I cannot say that his decision is in conformity with the Act of Parliament. I cannot find the building a new agent's house in any of the sub-sections of the Act which is before us." This was a decision that the building of a new agent's house did not fall directly within any of the improvement clauses. The question whether it was incident to, necessary, or proper for securing the full benefit of any other authorized improvements did not arise, and in the particular case none of the other proposed improvements were in fact authorized.

There are two cases in which the point has apparently arisen. In *In re Orwell Park Estate* (2) Swinfen Eady J. allowed an expenditure of capital moneys for laying out a cricket ground, but declined to allow anything for building a cricket pavilion.

On the other hand, in *In re Earl De La Warr's Settled Estates* (3) Eve J. sanctioned the expenditure of capital money on the construction of a golf course as an improvement within the words "open space" in clause 17 and also a large sum for the construction of a club-house or pavilion in connection therewith.

These authorities are apparently not quite consistent, and if it were necessary for me to deal with them I might have considerable difficulty. But I can decide the present case on the broad ground that as it is proper to do the necessary works under sub-clauses 17 and 18 to convert the vacant land into building land, it is

(1) 30 Ch. D. 102.

(2) 48 Sol. J. 193.

(3) [1911] W. N. 171.

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obviously necessary for securing the full benefit of that conversion that the estate agent should have an office in which he can keep accounts and documents and superintend the carrying out of the works. I therefore authorize the expenditure of a sum not exceeding 250*l.* on building the proposed office.

Solicitors: *Gustavus Thompson & Sons.*

G. R. A.

C. A.
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Oct. 21, 22; *Nov.* 20.

In re BLOW.

GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL *v.* CAMBDEN.

[1911 B. 3854]

Administration — Creditor's Action — Common Account — Liability under Covenants in Lease—Executors of Lessee's Deceased Executor—Devastavit —Distribution among Beneficiaries of Lessee's Residue more than Six Years before Action—Action to recover Money—Statute of Limitations— Trustee Act, 1888 (51 *&* 52 *Vict. c.* 59), *s.* 1, *sub-s.* 3; *s.* 8, *sub-s.* 1 (*a*) *and* (*b*).

The lessee under certain leases from the plaintiffs died in January, 1902, having specifically bequeathed the leaseholds to his wife for life and after her death to his children. In October, 1902, his executors distributed the entire residue without making any provision against their liability under the covenants in the leases otherwise than by taking an indemnity from the beneficiaries. In 1906 one of the executors died. After 1909 the rent under the leases fell into arrear. In 1911 the plaintiffs commenced a creditor's administration action against the surviving executor and the beneficiaries, to which action the executors of the deceased executor were subsequently added as defendants for the purpose of taking the estate accounts and charging the estate of the deceased executor with all sums received by him :—

Held by the Court of Appeal (Cozens-Hardy M.R. and Swinfen Eady L.J., Phillimore L.J. dissenting), that, as against the executors of the deceased executor, the action, although in form a common creditor's administration action, was in reality an action the whole object of which was to recover money within the meaning of s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, and that under the provisions thereof the lapse of time afforded these defendants a good defence.

Decision of Warrington J. [1913] 1 Ch. 358, reversed.

How v. *Earl Winterton* [1896] 2 Ch. 626, applied.

Per Swinfen Eady L.J.: An executor can plead the Trustee Act, 1888, against a creditor in like manner as an express trustee can plead it against his cestui que trust.

The principle stated in *In re Marsden* (1884) 26 Ch. D. 783, and *In re Hyatt* (1888) 38 Ch. D. 609, that an executor cannot set up his own devastavit in order to obtain the benefit of the Statute of Limitations, has been altered by the Trustee Act, 1888.

Per Phillimore L.J. (dissenting): The lapse of time which under s. 8, sub-s. 1 (*b*), the executors of the deceased executor were entitled to plead in bar, being such only as they could have pleaded in an action for money had and received, ran from the time when the creditors could have first sued, and as the plaintiffs' right of action first accrued after 1909 when the rent fell into arrear, the plea of lapse of time did not afford these defendants a good defence.

APPEAL from a decision of Warrington J. (1)

The testator, Samuel Blow, was the lessee under seven leases from the plaintiffs of certain houses for a term of forty-two years from March, 1885, at rents amounting in all to 2000*l.* per annum. Each lease contained a covenant for payment of the rent.

The testator died on January 8, 1902, and his will and codicil were proved in February, 1902, by his executors, William Cambden and Frederick Dawkins. The houses in question were specifically bequeathed to the testator's wife for life (the executors paying the ground rent and the cost of repairs out of the income of the houses) and after her death to his children. The residue was bequeathed to his wife and children in certain shares.

In October, 1902, the executors distributed the estate amongst the beneficiaries, taking from them an indemnity in respect of the covenants and liabilities under the leases, but not otherwise providing for satisfaction of those claims. At that date and until 1908 the rack rents of the property were more than sufficient to provide for the rent due to the plaintiffs, and the rent was in fact paid until 1908, and further payments were made under stress of proceedings in 1909.

Frederick Dawkins died in September, 1906, and his executors were Sarah Ann Dawkins, A. A. Whitehead, and W. S. Lane.

The rent under the leases having again fallen into arrear, the plaintiffs, in November, 1911, commenced this action against William Cambden, the surviving executor, and the beneficiaries for administration of the estate of the testator and asking that

(1) [1913] 1 Ch. 358.

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"so far as may be necessary to satisfy all claims of the plaintiffs the defendant William Cambden may be declared and made liable for having distributed among the other defendants portions of the testator's estate, and that he may be required to enforce his rights of indemnity against them, and that they may be ordered to refund the amounts received by them," and for incidental relief.

Pleadings were delivered, and at the trial on July 11, 1912, Warrington J. pronounced judgment for accounts and inquiries in the form usual in actions by unpaid creditors where the estate or part of it has been paid to beneficiaries. It was then pointed out that to make the account complete the representatives of Frederick Dawkins ought to be parties. This view was accepted, and on July 31, 1912, the writ was amended by adding A. A. Whitehead and W. S. Lane as defendants, Sarah Ann Dawkins being already a defendant as a beneficiary. They duly appeared and delivered a defence, and at the trial Warrington J. granted a decree under which the estate of Frederick Dawkins would be made liable for money paid over by W. Cambden and F. Dawkins in 1902 to the beneficiaries, being of opinion that s. 8 of the Trustee Act, 1888, afforded Dawkins' executors no defence to the action.

From this decision Dawkins' executors appealed.

Clauson, K.C., *J. M. Gover*, and *H. S. Howard*, for the appellants. The appellants are protected by s. 8 of the Trustee Act, 1888. (1) At common law an action for devastavit is barred

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(1) Trustee Act, 1888, s. 8, sub-s. 1, provides: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

"(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

"(*b*) If the action or other pro-after the lapse of six years by the Limitation Act, 1623 (21 Jac. 1, c. 16), and since the Act of 1888 the liability of an executor in respect of moneys honestly paid away by him is barred at the expiry of six years from the date of the payment, whatever be the form of the proceedings by which it is sought to enforce the liability: dictum of Fletcher Moulton L.J. in *Lacons* v. *Warmoll.* (1)

It is admitted that the representatives of Frederick Dawkins must account for everything that came to his hands or which they have received within six years of the issue of the writ in this action, but nothing has been so received.

So far as the plaintiffs' claim is for a devastavit their remedy is barred both at law and in equity by the Statute of Limitations. Whatever the practice may have been before the statute of James I. with regard to turning a judgment de bonis testatoris to a judgment de bonis propriis, at any rate after that statute, before an executor could be made liable for the debt de bonis propriis there must have been an action suggesting a devastavit: *Ward* v. *Thomas* (2); and, that being so, the question of a devastavit must have arisen during the course of the proceedings on which it was possible to set up the Statute of Limitations. The old practice is fully discussed in Williams on Executors, 10th ed. p. 1598, and in the note to *Wheatley* v. *Lane.* (3) *Lacons* v. *Warmoll* (1) is a distinct authority shewing that at law an executor could set up a devastavit committed six years before.

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ceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

(1) [1907] 2 K. B. 350, 364.

(2) (1833) 2 Dowl. 87.

(3) (1669) 1 Saund. 216, 219.

In equity also the remedy for devastavit was barred by the Statute of Limitations: *Thorne* v. *Kerr* (1); *In re Gale.* (2)

In administration, however, an executor could not formerly have set up his own wrong by pleading a devastavit committed more than six years before and he was treated as if the assets were still in his hands: *In re Marsden* (3); *In re Hyatt.* (4)

[COZENS-HARDY M.R. referred to *In re Kay.* (5)]

But the Trustee Act, 1888, has altered the previous law and enables an executor, or his personal representatives, to plead the lapse of six years as a good defence to an action on an honest though mistaken distribution or payment. Sect. 1, sub-s. 3, provides that the term "trustee" shall be deemed to include an executor, and s. 8, sub-s. 1 (*a*) and (*b*), enables him to set up the defence of the Statute of Limitations. Thus the appellants are entitled to the same protection as if the action had been brought against them at law—*In re Croyden* (6)—and may plead that the plaintiffs' claim is barred by the Statute of Limitations.

The appellants come within both paragraphs (*a*) and (*b*) of sub-s. 1 of s. 8 of the Trustee Act, 1888. If at law there had been no statute which would have assisted the appellants, then there might have been some difficulty in saying that they came within paragraph (*a*), but we submit that the Court ought to look and see what would have been the proper statute applicable if an action on a devastavit had been brought. The appellants also come within paragraph (*b*). In an action by beneficiaries trustees have by virtue of paragraph (*b*) set up the lapse of time successfully—*How* v. *Earl Winterton* (7); *In re Croyden* (6)—and the case of creditors is a fortiori. Although in form this is an action for administration the whole object of it is to recover money, and it comes within the scope of paragraph (*b*) and entitles the appellants to plead the lapse of time as a bar.

The account as against the appellants should be limited to six years before the amendment of the writ.

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(1) (1855) 2 K. & J. 54.
(2) (1883) 22 Ch. D. 820.
(3) 26 Ch. D. 783.
(4) 38 Ch. D. 609.
(5) [1897] 2 Ch. 518.
(6) (1911) 55 Sol. J. 632.
(7) [1896] 2 Ch. 626.

There is the further question whether the appellants are not entitled to relief under s. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35).

[COZENS-HARDY M.R. That question had better stand over for the present. Warrington J. did not deal with it on the hearing in the Court below.]

Cave, K.C., and *E. Beaumont,* for the respondents, the plaintiffs in the action. The executors knew the risk they were running in distributing the residue in 1902. Down to 1908 there had been no default in payment of rent, and therefore the plaintiffs could not have sued before they did, nor could they have brought an action for administration to have a part of the assets impounded to answer contingent breaches of covenant: *King* v. *Malcott.* (1) But, nevertheless, if the appellants are right, they can escape liability now by saying that six years before the action was commenced they had wasted the assets. That would work a gross injustice. Delay is the gist of the defence of the Statute of Limitations, but there can be no delay in suing when the debt is not yet due.

The order sought is for a common account in an administration action and it is proper and right to make the personal representatives of a deceased executor parties to the action. If a deceased executor has received money, then his representatives may be joined as accounting parties : *Holland* v. *Prior* (2); and in *In re Charlton* (3) this Court recently made a similar order, and there were no special circumstances in that case. The appellants could and ought to be brought before the Court in these proceedings, and they are brought here for that reason only, and not for the purpose of charging a devastavit against them. The plaintiffs claim a common account and do not rely on or claim a devastavit at all, and that keeps the case outside the Trustee Act, 1888, altogether. That being so, *In re Marsden* (4) and *In re Hyatt* (5) are conclusive in the plaintiffs' favour. In *Lacons* v. *Warmoll* (6) Buckley L.J. said that in administration a man cannot set up his own wrong in improperly dealing with assets, and that so far as he is not able to discharge himself the assets must be treated as still in his hands.

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(1) (1852) 9 Hare, 692.
(2) (1834) 1 My & K. 237.
(3) Unreported.
(4) 26 Ch. D. 783.
(5) 38 Ch. D. 609.
(6) [1907] 2 K. B. 350.

This action does not come within s. 8 of the Trustee Act, 1888. Paragraph (*a*) of s. 8, sub-s. 1, has no application because there is no statute which could have been pleaded if the defendants had not been trustees; there is no statute applicable to an administration action. Paragraph (*b*) of the same sub-section also has no application, because this is an action not by a beneficiary to recover money but by a creditor for administration. If that paragraph does apply, it only gives liberty to plead lapse of time from the date when the right of action accrued; it does not say that the action shall be barred. The plaintiffs are not prejudiced by the lapse of time, because they could not have sued before they did, for no cause of action arose before rent became due: *In re Hargreaves* (1); and the words of the paragraph "as if the claim had been against him in an action of debt for money had and received" shew that there could be no action until there was a debt.

In *How* v. *Earl Winterton* (2), which was a beneficiary's action, the annuitant could have sued before he did. In *In re Croyden* (3) it was decided that so far as the action was for breach of trust it was barred, but so far as it was an action for administration it was not out of time, and an order for administration was made. That was an action by a beneficiary who had been a beneficiary for the full period of six years, and that distinguishes that case from this. [They also referred to *Midgley* v. *Midgley* (4), *Lynar* v. *Mills* (5), *Dodson* v. *Sammell* (6), and *In re Nixon*. (7)]

Clauson, K.C., in reply.

J. G. Wood, for the defendant Cambden, and *Wright Taylor*, for other parties.

Cur. adv. vult.

Nov. 20. COZENS-HARDY M.R. The testator, Samuel Blow, was the lessee under seven leases from St. Bartholomew's Hospital of certain houses for a term of forty-two years from March, 1885, at rents amounting in all to 2000*l.* a year. He died on January 8, 1902, and his will and codicils were proved on February 27, 1902, by Cambden and Dawkins. Dawkins died on September 7, 1906. In 1902 Dawkins and Cambden distributed the estate between the legatees under the will, taking from them an indemnity in respect of the covenants and liabilities under the leases. At that date, and until 1908, the property leased produced sufficient to provide for the rent due to St. Bartholomew's Hospital. The lessors in 1908 commenced an action against Cambden as assignee of the terms of years and as the surviving executor of the testator, in which action he recovered judgment.

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(1) (1890) 44 Ch. D. 236.
(2) [1896] 2 Ch. 626.
(3) 55 Sol. J. 632.
(4) [1893] 3 Ch. 282.
(5) (1805) 2 Sch. & Lef. 338
(6) (1861) 1 Dr. & Sm. 575.
(7) [1904] 1 Ch. 638.

The present action was commenced against Cambden and the beneficiaries and sought, amongst other things, to obtain from the beneficiaries the moneys received by them from the executors in 1902. In July, 1912, the writ was amended by adding the executors of Dawkins as co-defendants and asking relief against his estate, and Warrington J. has granted a decree under which the estate of Dawkins will be made liable for money paid over by Cambden and Dawkins in 1902 to the beneficiaries. The present appeal is by Dawkins' executors, who rely upon s. 8 of the Trustee Act, 1888, as a defence. It is admitted that there was no fraud or fraudulent breach of trust and that there was no trust property, or the proceeds thereof, still retained by the trustees or previously received by them and converted to their own uses. In other words the present case is not within the exceptions in s. 8.

There is no contractual liability between the plaintiffs and the executors of Dawkins. The terms are not vested in them. I assume that their testator was guilty of a devastavit in 1902, although I am not satisfied that the Court would not, if the direction of the Court had been sought at the time, have sanctioned what was done. But it is plain that such an action is barred by the lapse of six years after the tort was committed. Before the Judicature Act this applied to a suit in equity as well as to an action at law: see *Thorne* v. *Kerr*. (1) If, therefore, the plaintiffs are suing on the ground of devastavit they must fail.

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(1) 2 K. & J. 54.

It is, however, urged on behalf of the plaintiffs that the executors of Dawkins were proper parties, if not necessary parties, to the administration action, and that in such action they must account from the testator's death, and that they cannot be allowed to discharge themselves by reason of their testator's wrongful act in distributing the estate in 1902, and the plaintiffs further say that the present action is not one which falls within s. 8, it not being brought by a beneficiary or to recover money, but is merely a common creditor's administration action, and further that the lessors could not have maintained any action before 1908, and that they therefore ought not to be prejudiced by the lapse of more than six years. I am unable to assent to these arguments on the part of the respondents. The language of s. 8 is perfectly general and it would be wrong to limit it to an action by a beneficiary as distinguished from a creditor. An executor is a trustee within the definition clause in the Act, and he stands in a fiduciary relation towards creditors. I think the case falls within sub-s. (*b*), the necessary effect of which often is to enable a trustee to take advantage of his own breach of trust. For instance, if a trustee invests 1000*l.* on improper securities and the money is lost, I think it is clear that after the lapse of six years the statute might be pleaded as a defence to an action brought by a person (not being a reversioner) seeking only relief in respect of that breach of trust and payment by the trustee into Court or otherwise of the money lost. It cannot in my opinion make any difference if the action takes the form of a general administration suit in which a common account is directed. In such a case the statute equally protects the trustee when the account is taken. Any other view would render the beneficial provision of the Act to a large extent inoperative. The judgment of Kekewich J. in *How* v. *Earl Winterton* (1) states the point very forcibly: "Mr. Micklem urges that the result is that a trustee against whom an account has been ordered to be taken may go into chambers and say, 'True, I had the money: true, I spent it in an improper manner and it ought to be here available for you, and it is by my own default that it is not forthcoming; but, as that happened six years ago, you cannot claim it'—that is to say, he may claim to set up the statute in order to shield himself from the consequence of his own wrongdoing, speaking of it, of course, as a legal act and not as a moral wrong. That seems to me to be precisely what the statute says he may do. Although some one may be debarred from a righteous remedy, and although some one may go scot-free where strict justice would require him to pay money that he owes, still, on the whole, it is for the benefit of the public that actions against trustees for innocent breaches of trust should be put an end to. That is the principle, as it seems to me. I cannot see that it is right to stop short of applying that principle here merely because this is an action for account and not an action simply to recover a certain sum of money. Therefore, an account must be taken, with a special direction to the chief clerk that, as to any moneys proved to have been parted with before six years from the issue of the writ, the statute will be applicable." The decision in the Court of Appeal takes precisely the same view and the form of judgment (1) proceeds on that footing. The form of the order was as follows : "And the defendant by his counsel admitting that on the 9th August 1889"—six years before the issue of the writ—"there were moneys in his hands liable to the trust for accumulation by the will of the testatrix directed, this Court doth order that the following account be taken, that is to say :——An account of the moneys in the hands of the defendant on the 9th August 1889, liable to the trusts for accumulation under the will of the testatrix Mary Rabett, and of the rents and profits of the testatrix's estate subsequently received by him in respect of the said term of fourteen years; but in ascertaining the actual amounts of the moneys in the hands of the defendant on the date aforesaid, any payments made before that date are to be allowed to the defendant."

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(1) [1896] 2 Ch. 626, 633.

In my opinion the decree of Warrington J., so far as it affects the executors of Dawkins, must be reversed and the action dismissed against them with costs. If the plaintiffs desire, at their risk as to costs, to take an account limited to six years before the amendment of the writ, they can do so, but I do not understand that there is any suggestion that one penny has been received either by Dawkins or the appellants as executors since July, 1906.

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(1) *How* v. *Earl Winterton* (No. 2), (1897) 79 L. T. 344, 346.

Various points have been raised in argument with which I do not think it necessary to deal. I think it sufficient to dispose of the appeal on the ground which I have stated.

I desire to add that it may often be desirable to direct a full account to be taken in order to ascertain whether the case falls within the exceptions in s. 8 and to reserve the question as to s. 8 until further consideration. But in the present case the facts are not in dispute, and it would be wrong not to decide the point of law at the present stage, and indeed the parties have not disputed this.

The appeal must be allowed with costs.

SWINFEN EADY L.J. It is conceded that the only cause of action which the plaintiffs have at law against the executors of Frederick Dawkins, who are the defendants appealing, is for a devastavit by Frederick Dawkins in the year 1902, and that the remedy is barred at law by the Statute of Limitations, the writ herein having been amended by joining Dawkins' executors on July 31, 1912. So far as the plaintiffs' claim is for a devastavit the remedy is also barred in equity. In *Thorne* v. *Kerr* (1) the plaintiff, who was a bond creditor of the original testator, sought to make the real estate of Lady Antrim, who was a deceased executrix of an executor, liable for the debt. Wood V.-C. said: "The bond is what leads up to the remedy, but the real foundation of the suit is the devastavit, as to which the remedy is barred by the lapse of six years, this Court following in that respect the analogy of the Courts of law."

This, however, does not dispose of the case. The plaintiffs are creditors of Samuel Blow, the testator, and it is not disputed that William Cambden, the surviving executor, is liable to them upon the covenants for payment of rent contained in the leases. As such creditors they claim to administer the estate of the testator, and contend that, in taking the estate accounts under the direction of the Court, the estate of Frederick Dawkins, deceased, must be charged with all sums received by him, and can only be

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(1) 2 K. & J. 54, 63, 64.

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allowed proper payments—that his executors cannot claim, as a payment which he ought to be allowed, any sum not paid away in a due course of administration—that he cannot set up his own wrongful payment, and then say that as it occurred more than six years before suit he is under no liability for it. The result of this would be the disallowance of all sums paid to beneficiaries, although honestly and bona fide paid away more than six years before this action.

It has been decided that in an action by a beneficiary under a will the trustee can plead the Trustee Act, 1888, and this will afford him a defence against liability to a beneficiary in possession for breaches of trust committed more than six years before writ. *In re Swain* (1); *In re Page* (2); *How* v. *Earl Winterton*. (3) The last was a decision of the Court of Appeal affirming a judgment of Kekewich J. That learned judge had put the point in this way: "Mr. Micklem urges that the result is that a trustee against whom an account has been ordered to be taken may go into chambers and say, 'True, I had the money: true, I spent it in an improper manner and it ought to be here available for you, and it is by my own default that it is not forthcoming; but, as that happened six years ago, you cannot claim it'—that is to say, he may claim to set up the statute in order to shield himself from the consequence of his own wrongdoing, speaking of it, of course, as a legal act and not as a moral wrong. That seems to me to be precisely what the statute says he may do. Although some one may be debarred from a righteous remedy, and although some one may go scot-free where strict justice would require him to pay money that he owes, still, on the whole, it is for the benefit of the public that actions against trustees for innocent breaches of trust should be put an end to. That is the principle, as it seems to me. I cannot see that it is right to stop short of applying that principle here merely because this is an action for account and not an action simply to recover a certain sum of money." This view was adopted by the Court of Appeal, though they varied the form of the judgment. In the Court below, an account was directed, with a special direction to the chief clerk that as to any moneys proved to have been parted with before six years from the issue of the writ the statute would be applicable. The Court of Appeal, however, refused to direct an account, which might involve the disallowance of any payment, which the defendant could not justify against the plaintiff. The account was limited to six years before writ with an inquiry what sum the defendant had in his hands at the commencement of the period. As to the ultimate form of the order see *How* v. *Earl Winterton* (No. 2). (1)

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(1) [1891] 3 Ch. 233.
(2) [1893] 1 Ch. 304.
(3) [1896] 2 Ch. 626, 633.

It is urged that the same rule ought not to be applied when it is a creditor and not a beneficiary under a trust who is suing, and in the Court below the present case was distinguished by Warrington J. from *In re Croyden* (2), decided by Eve J., by stating "That was a beneficiaries' action to which very different considerations apply." It must, however, be borne in mind that an executor is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office. "A devastavit or waste in an executor or administrator is when he doth misemploy the estate of the deceased, and misdemean himself in the managing thereof, against the trust reposed in him": Sheppard's Touchstone, p. 485.

In my opinion, an executor can plead the Trustee Act, 1888, against a creditor, in like manner as an express trustee can plead it against his cestui que trust. I quite fail to see how a creditor can have any better right against an executor than a cestui que trust has against a trustee. *In re Marsden* (3) and *In re Hyatt* (4) were decided before the Trustee Act, 1888.

Then it was said that the present action is not to recover money, but was brought to obtain administration, in the course of which money might be payable to the plaintiffs, and Warrington J. took the view that this action is not on the true construction of the Act of 1888 what is meant by an action to recover money. I am unable to adopt this view. In my judgment it is an action to recover money. The whole object of the action is to recover money—the rent due to the plaintiffs—and administration is merely the form of the remedy. In *How* v. *Earl Winterton* (1) Rigby L.J. said: "The only thing is, you might say, this is not an action to recover money. But I do not think that means money as belonging to the person. It is, in substance, an action to make the trustee pay money, and to pay money into a fund as against which the applicant has a claim." The present is a much stronger case on that point, as it does not even appear that there is any other creditor. The whole object of this action is to make the defendants pay money to the plaintiffs.

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(1) 79 L. T. 344, 346.

(2) (1908) 125 L. T. Jour. 282, and on further consideration, 55 Sol. J. 632.

(3) 26 Ch. D. 783.

(4) 38 Ch. D. 609.

It was further contended that a creditor is a beneficiary within s. 8, sub-s. 1 (*b*), and that as time does not run against a beneficiary unless and until his interest is an interest in possession, the six years ought only to run against the plaintiffs from the date when each payment of rent accrues payable under the leases. In my opinion a creditor is not a beneficiary within s. 8, sub-s. 1 (*b*).

An executor is not an express trustee for residuary legatees or next of kin, and certainly not for creditors. In *Dacre* v. *Patrickson* (2) Kindersley V.-C. said: "Strictly speaking, a trustee cannot have a trust imposed upon him virtute officii as executor. If a trust is imposed upon him, it is in another character, viz., that of trustee, whose duty it is to carry out the trust. Qua executor, he cannot have a trust imposed upon him by the will. The only trust of which he is capable as executor is the trust created by the law for the next of kin"—that is to say, trustee by implication of law. See also *In re Lacy* (3), before Stirling J.

Even in the case of a beneficiary, time runs from the date when his interest becomes an interest in possession, as distinguished from an interest in remainder, and not from the time when some sum may become actually payable to him. Thus in *How* v. *Earl Winterton* (4) the statute ran from the expiration of the term, as from which date the plaintiff's annuity accrued and began to run, and not from the date when the first instalment of the annuity would become payable, which was six months after the expiration of the term.

(1) [1896] 2 Ch. 626, 642.
(2) (1860) 1 Dr. & Sm. 182, 185.
(3) [1899] 2 Ch. 149.
(4) [1896] 2 Ch. 626.

The intention of the statute was to give a trustee the benefit of the lapse of time when, although he might have done something legally or technically wrong, he had done nothing morally wrong or dishonest.

It was urged that if the plaintiffs were barred in the present case, the result would be that a creditor might be barred by lapse of time anterior to the date when he could commence proceedings, and that however diligent he could not help being shut out of all remedy by the statute. The answer is that as regards any claim founded on the devastavit he is properly barred in equity as well as at law. As regards his debt against the legal personal representative liable to him, he is not barred, and moreover can follow the assets into the hands of a legatee. In *March* v. *Russell* (1) Lord Cottenham said: "Formerly, when legacies were paid, it seems to have been the practice to oblige the legatee to give security to refund, in case any other debts were discovered. That practice has been discontinued, but the legatee's liability to refund remains. The creditor has not the same security for the refunding as when the legatee was obliged to give security for that purpose, but he has the personal liability of the legatee."

This is perfectly just. The lessor has not any right to have assets set aside to meet any future contingent liability under the lease: *King* v. *Malcott.* (2) The lessor had originally merely a right to bring a personal action against the testator, and it would be giving him more than his due, if a portion of the testator's estate were set apart as security for his claim.

Where an executor has taken proper measures to ascertain all claims on the estate, and satisfied all which exist, by paying over the balance to the residuary legatees he has merely done out of Court what the Court would order him to do in an administration action.

In *Lacons* v. *Warmoll* (3) Fletcher Moulton L.J. thus expressed himself: "As at present advised, I am of opinion that (at all events since the passing of the Trustee Act, 1888) the liability of an executor in respect of moneys honestly paid away by him, as in this case, is barred at the expiry of six years from the date of the payment, whatever be the form of the proceedings by which it is sought to enforce the liability." I am of the same opinion. In my judgment the appeal of Dawkins' executors should be allowed.

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(1) (1837) 3 My. & Cr. 31, 41.

(2) 9 Hare, 692.

(3) [1907] 2 K. B. 350, 364.

PHILLIMORE L.J. This action is brought to enforce a creditor's claim against the estate of Samuel Blow, deceased, the defendants being the surviving executor and the executors of a deceased executor and other parties not now necessary to be considered.

The plaintiffs are the Lord Mayor and Commonalty and the citizens of the City of London suing as Governors of St. Bartholomew's Hospital on behalf of themselves and all other creditors.

Their claim arises in this way. Samuel Blow was at the date of his death a lessee from St. Bartholomew's Hospital under seven indentures of lease at rents in the aggregate apparently amounting to 2000*l.* per annum. At the time of his death and for a considerable time afterwards the rents which he and his estate got from under-tenants were sufficient to pay the head rents, but latterly they have been insufficient, and the rent due to the plaintiffs has been in arrear since 1909.

Samuel Blow by his will appointed as his executor the defendant William Cambden and by a codicil one Frederick Dawkins. These two proved the will after the testator's death in January, 1902.

Dawkins died on September 7, 1906, having made the defendants Sarah Ann Dawkins, Ambrose Augustus Whitehead, and William Stewart Lane his executors, and they proved his will.

In these circumstances the action is brought, as I have said, against Cambden, the surviving executor, and the executors of Dawkins. Such an action is rightly constituted: see *Holland* v. *Prior*. (1) Relief can prima facie be obtained in such an action from the surviving executor and the executors of the deceased executor in respect of assets come to the hands of the original executors and not paid away in due course of administration.

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(1) 1 My. & K. 237.

The cases of *Holland* v. *Prior* (1) and *Thorne* v. *Kerr* (2) establish this, and indeed the point is not contested.

The defence of the executors of Dawkins, against whom Warrington J. has given judgment and who are the present appellants, arises out of a particular incident in the disposal of Samuel Blow's estate.

In October, 1902, the executors distributed the estate among the beneficiaries, taking from them an indemnity, but making no other provision for any of their testator's debts or liabilities; and the executors of Dawkins insist that this being so they are only liable for the assets, if any, of the testator Blow, which have been in Dawkins' or their hands within six years from the date of the action, and as the action was as against them begun on July 31, 1912, this would protect them in respect of any date before July 31, 1906. As there is little question that no beneficial assets have been in their hands or were in the hands of Dawkins after the distribution in October, 1902, the claim against their testator Dawkins or themselves is valueless.

This defence is rested upon the provisions of s. 8 of the Trustee Act, 1888. It is said that these defendants are within its provisions, as by s. 1 "the expression 'trustee' shall be deemed to include an executor" and they are not within the exceptions, and so can rely upon the defences given by this section.

Sub-s. 1 of s. 8 is divided into two paragraphs. Paragraph (*a*) is as follows: "All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him." We are, I believe, all agreed that this paragraph does not apply. There were no rights or privileges conferred by a statute of limitations which could have been enjoyed by these defendants if their executor had not been an executor. If he had not been an executor there would be no right of action and no question of a statute of limitations.

I now come to paragraph (*b*): "If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received . . . ." This, it is suggested, is intended to protect the trustee against the form of proceeding in *Holland* v. *Prior* (1) and the decisions in *In re Marsden* (2) and *In re Hyatt* (3); and the case of *How* v. *Earl Winterton* (4) is relied upon.

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(1) 1 My. & K. 237.

(2) 2 K. & J. 54.

Let me go back upon the words "a trustee is to be at liberty to plead the lapse of time as a bar . . . . in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received." Rigby L.J. in *How* v. *Earl Winterton* (4) points out how the analogy works.

When does time begin to run in an action for money had and received? From the time when the money has been had and received to the plaintiff's use, so that the plaintiff could sue for and recover it. The statute runs because the plaintiff could sue. The section we are considering puts a trustee in the same position as a recipient of money belonging to another. The lapse of time which the trustee is entitled to plead in bar runs from the date when the beneficiary could have first sued him. Where the beneficiary has two remedies, accruing at different dates, it may be a question whether the lapse of time from the date when the earlier remedy could have been used could be pleaded in bar of the later remedy. It is pretty clear that at any rate there were cases before the statute of 1888 in which the form of procedure made all the difference as to whether the Statute of Limitations could or could not be pleaded in an action of law, or to a suit in equity in cases where a Court of Equity "would follow in that respect the analogy of Courts of law."

Let me first consider what is the form of procedure at law in an action against an executor for the debt of his testator. If the debt be an admitted one the executor can only plead plene administravit or plene administravit praeter. And supposing him not so to plead or to have judgment against him upon his plea, execution follows de bonis testatoris. If he have in fact wasted the assets so that this execution is fruitless he can then be charged in two or three alternative modes of procedure and execution can be obtained against him de bonis propriis. In one of the forms of procedure the sheriff returns, or a suggestion is made of, a devastavit. It is not, however, the executor who can set up a devastavit and say that this devastavit happened more than six years ago and so plead the Statute of Limitations. He cannot so plead his own wrong. The judgment of the Court is conclusive that there are, or are to be deemed to be, assets of the testator in his possession, and if they are not to be found, he has made away with them; when, it does not matter—possibly the day before, possibly many years ago—the judgment creditor need state no date, all he says is "You ought to have the testator's goods in your hands."

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(1) 1 My. & K. 237.
(2) 26 Ch. D. 783.
(3) 38 Ch. D. 609.
(4) [1896] 2 Ch. 626.

In some cases it may be convenient for a creditor to pass by all those preliminary steps, and if he knows that the executor has wasted his testator's goods and has no assets of the testator in his hands, and if speed is—as it is so often—of importance, he may bring an action alleging a devastavit as a tort and recover as damages the equivalent to his debt. Also at one period in our law there seems to have been certain advantages in the way of costs in such a proceeding. Again, this is the only form of remedy at law available to a creditor against the representatives of a pre-deceasing executor. If, however, the creditor bring such an action when the tort was committed more than six years before action, the Statute of Limitations will bar him. Similarly if he rely upon a devastavit in a suit in equity, the Court of Equity will apply the Statute of Limitations: *Thorne* v. *Kerr* (1), already cited. But if he chose to sue for an account a Court of Equity would not allow the executor to set up his own devastavit and then plead or rely upon the statute; so Chitty J. decided in *In re Hyatt.* (2)

The appellants' counsel relied on *Lacons* v. *Warmoll.* (3) It

(1) 2 K. & J. 54.
(2) 38 Ch. D. 609.
(3) [1907] 2 K. B. 350.

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was a curious case and shews the disadvantage of trying a claim of importance without pleadings; but I do not think it assists them. The county court judge gave a judgment which the Divisional Court construed as a judgment de bonis testatoris followed by the appropriate remedies in case there should be a return of nulla bona, all packed into one judgment or order. So construing it, the Divisional Court rightly held that there was no statute of limitations applicable. The Court of Appeal construed it as a judgment appropriate to an action of devastavit. So construing it, they necessarily applied the Statute of Limitations, Buckley L.J. pointing out that the plaintiffs could not have a judgment for administration of the testator's estate because they had not made all the executors parties.

I now come to *How* v. *Earl Winterton.* (1) There the plaintiff, an annuitant whose annuity first accrued in May, 1889 (fourteen years after the death of the testator), was paid till November, 1894, and brought her action in August, 1895. There had in fact been continuous breaches of trust during the fourteen years in not accumulating the rents of the estate so as to make a fund for her, and while the defendant, the trustee under the will, admitted that he had certain assets in his hands within the last six years for which he must account, as to the moneys previously lost he pleaded the Act of 1888, and it was held that his defence was good. After reading and re-reading that case, I have not been able to gather whether the plaintiff framed her action upon a series of positive breaches of trust upon which she relied—a form of pleading analogous to an action of devastavit—or whether she simply sought for an account and administration. In the former view the case decides very little. In the latter view it decides that the lapse of time accrues from the date when the beneficiary could have used the earliest remedy open to him or her. In either view it is not this case. A beneficiary can sue from the moment the breach of trust is committed. He can restrain it and compel the trustees to replace the misappropriated funds. A creditor whose debt has not accrued has no such remedies, whether he be a landlord: *King* v. *Malcott* (2); an annuitant by deed: *In re Hargreaves* (1); or, possibly, a company whose shares are not fully paid up: *In re King.* (2) His time has not begun to run. In *How* v. *Earl Winterton* (3) Lindley L.J. seems to point this out pretty clearly when he speaks of each failure of the defendant to invest as he should have done as a breach of trust, and each breach of trust as "giving her a fresh cause of action." The phrase is his, not mine, and it shews the way in which he was looking at the case. This must have been the view taken by Warrington J., to whose notice this authority was brought.

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(1) [1896] 2 Ch. 626.

(2) 9 Hare, 692.

I ought, before concluding, to refer to the decision of Eve J. in *In re Croyden.* (4) The reports are short and it is difficult to ascertain that there was any clear principle decided, or any argument raising the point. The case may, if it does contain any principle, be distinguished, as Warrington J. distinguished it, as the case of a claim by a beneficiary. If it be otherwise, and I am to choose between the decisions of two learned judges, I prefer that of Warrington J.

On the whole I am of opinion that this appeal should be dismissed.

Solicitors: *Taylor & Bryden and Carter & Carter; Wilde, Moore, Wigston & Co.; E. V. Huxtable; Mills, Curry & Gaskell.*

(1) 44 Ch. D. 236.
(2) [1907] 1 Ch. 72.
(3) [1896] 2 Ch. 626, 637.
(4) 125 L. T. Jour. 282; 55 Sol. J. 632.

R. M.

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In re PEARCE.
ALLIANCE ASSURANCE COMPANY, LIMITED *v.* FRANCIS.

[1912 P. 724.]

Will—Construction—Gift to "Children"—Illegitimate Children—Belief of Testatrix in their Legitimacy—Exclusion.

A testatrix by her will dated in 1911 gave the residue of her property in trust for her brother F. during his life, and after his death in trust for "all or any the children or child of" F. living at the death of the survivor of the testatrix and F., "and the children or child then living of any deceased child of his who, whether children or grandchildren, being male attain the age of twenty-one years or being female attain that age or marry."

At the dates of the will and the testatrix's death respectively F. had six illegitimate children living (who had been born to him by K., to whom he was reputed to be married, and who died in 1900), and two legitimate children by his marriage in 1904 with S. K. was throughout supposed to be and was accepted as F.'s wife in the society in which they moved; her six children were received as legitimate children; and the testatrix knew them all and was fond of some of them, and had been informed by F. in response to an application by her for a list of his children prior to making her will that they were the children of his first wife:—

Held, that the only exceptions to the general rule that "children" prima facie meant legitimate children were those stated by Lord Cairns in *Hill* v. *Crook* (1873) L. R. 6 H. L. 265, 282, 283, and *Dorin* v. *Dorin* (1875) L. R. 7 H. L. 568, and that the fact that the testatrix in the present case was informed and believed that the six children of F. were legitimate did not constitute a further exception to that rule.

Held, therefore, that only the two legitimate children took under the gift.

In re Brown (1890) 63 L. T. 159, approved.

In re Du Bochet [1901] 2 Ch. 441, overruled.

Decision of Sargant J. [1913] 2 Ch. 674, affirmed.

Appeal from a decision of Sargant J. (1)

Mrs. Laura Theresa Pearce by her will, dated January 3, 1911, appointed the Alliance Assurance Company, Limited, to be her sole executor and trustee, and gave the residue of her real and personal estate to the company upon trust to pay the income to

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(1) [1913] 2 Ch. 674.

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her brother Walter William Francis during his life, and after his death to stand possessed of the corpus and income "In trust for all or any the children or child of my said brother Walter William Francis living at the death of the survivor of myself and my said brother and the children or child then living of any deceased child of his who, whether children or grandchildren, being male attain the age of twenty-one years or being female attain that age or marry, if more than one as tenants in common in equal shares, but so that the children of any deceased child of his shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and my said brother and attained a vested interest."

Testatrix died on October 16, 1911, and her brother W. W. Francis died on October 26, 1911.

W. W. Francis was a commercial traveller who down to 1884 or 1885 lived in England, but some time before September, 1885, he went to Glasgow and there lived until after his marriage to Rachel Penden Simpson, below mentioned.

He was reputed to be married to Harriet King, by whom he had seven children, six of whom survived him. Harriet King died on August 26, 1900. The first of these children was born in 1875.

W. W. Francis on January 13, 1904, married Rachel Penden Simpson, who survived him. By her he had two children only, one of whom was born on June 15, 1905, and the other on July 28, 1906.

The Alliance Assurance Company, Limited, took out an originating summons against the eldest child of Harriet King and the two children of the marriage with R. P. Simpson for the determination of the question whether the children of W. W. Francis by Harriet King living at the death of the testatrix and the children then living of any such child or children as were then dead were entitled to share in the residuary estate of the testatrix along with the children of W. W. Francis by his wife, R. P. Francis.

An order made on June 28, 1912, directed an inquiry what children, if any, of W. W. Francis were living at the death of the survivor of the testatrix and W. W. Francis, and whether there were then living any children or child of any deceased child.

It appeared from the evidence that prior to making her will the testatrix wrote and sent a post-card to her brother in the following terms :

"Will you give me the christian names of all your children and tell me how they are situate. I am making a new will and it is very important to have all the particulars correct."

In reply the brother sent to the testatrix a memorandum as to his family. In it the names of his children were arranged in two columns. The first column was headed "First wife" and contained the names and addresses of the six illegitmate children together with the occupations and wages of the sons and of the husbands of the married daughters. The second column contained the names of the two infant legitimate children, but without any heading. At the foot of the memorandum the brother wrote as follows:

"My dear Sister,

"This is a list of my children as requested. You ask me how each one is situated (financially I presume) their respective trade following will guide you as to their positions in life. I have had from time to time to help them all, and this quite recently owing to bad times in their midst.

"Your ever affect. brother,
"Wal."

The Master by his certificate found that the children of Harriet King were illegitimate, and that the only legitimate children were the two children of the marriage with R. P. Simpson. The Court found on the evidence that Harriet King was throughout supposed to be and was accepted as the wife of W. W. Francis in the society in which they moved, that the six children were received as their legitimate children, and that the testatrix knew all of them and was fond of some of them. The question subsequently argued was whether she had sufficiently expressed in her will that she intended to make provision for the six children of Harriet King under the description of "children" of W. W. Francis.

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Sargant J. held that only the two legitimate children took under the gift.

The illegitimate children appealed.

The appeal was heard on December 17 and 18, 1913.

Younger, K.C., *Martelli, K.C.*, and *E. F. Ball*, for the appellants. Upon the facts proved or admitted in this case it is conclusively shewn that the testatrix believed that the six illegitimate children were legitimate and that she intended to benefit them. She was informed by her brother that they were the children of his "first wife." Under those circumstances it is submitted that they take under the description of "children" notwithstanding that it has ultimately turned out that they were in fact illegitimate. Having regard to her state of belief the testatrix must be taken to have intended to include them under the description of "children," otherwise she would have excluded them by name or have limited her gift to the children of the second wife. Believing that the children were legitimate, the only appropriate term by which she could describe them was as "children," and the Court is not bound, it is submitted, to give that word a meaning which would exclude them. In *Dorin* v. *Dorin* (1) the testator knew that the children were illegitimate and did not use language sufficient to include them in the gift. That case has therefore no application to a case where, as here, the testatrix believed the children to be legitimate. *In re Du Bochet* (2) is on all fours with the present case. There in circumstances similar to those in the present case, Joyce J. held that the illegitimate children were entitled to share in the gift with the legitimate children. *In re Brown* (3) is no doubt against our contention, but in that case North J. did not refer in his judgment to the state of knowledge of the testatrix or to the surrounding circumstances. Further, that decision is not consistent with *Hill* v. *Crook.* (4) *In re Eve* (5) assists our contention. Swinfen Eady J. held that in that case "children" included illegitimate children.

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(1) L. R. 7 H. L. 568.
(2) [1901] 2 Ch. 441.
(3) 63 L. T. 159.
(4) L. R. 6 H. L. 265.
(5) [1909] 1 Ch. 796.

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[SWINFEN EADY L.J. The testatrix there knew that the children were illegitimate.]

In *Hill* v. *Crook* (1) Lord Cairns refers to two classes of exceptions to the general rule that "children" prima facie means legitimate children, but he does not state that they are the only exceptions, and it is submitted that the belief of a testator in the legitimacy of the children constitutes a further exception to the rule.

The reference in the gift to grandchildren of the brother, having regard to the tender years of the two legitimate children at the date of the will, affords a further indication of the intention of the testatrix that the illegitimate children should take under the gift. [They also referred to *Wilkinson* v. *Adam* (2) and Jarman on Wills, 6th ed. vol. ii. p. 1763.]

Romer, K.C., and *Wright Taylor*, for the legitimate children and *G. M. Hildyard*, for the trustees of the will, were not called upon to argue.

COZENS-HARDY M.R. This is an appeal from a judgment of Sargant J., who has held that six illegitimate children of the testatrix's brother do not take shares under a gift to children with two legitimate children.

The language of the will is perfectly clear; there is no difficulty of construction about it. The testatrix was a lady of considerable property, and she gave her residue to trustees in trust to pay the income to her brother Walter William Francis during his life (he in fact died, I think, about ten days after the testatrix), and after his death to stand possessed of the trust premises and the income thereof "In trust for all or any the children or child of my said brother Walter William Francis living at the death of the survivor of myself and my said brother and the children or child then living of any deceased child of his who, whether children or grandchildren, being male attain the age of twenty-one years or being female attain that age or marry, if more than one as tenants in common in equal shares, but so that the children of any deceased child of his shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and my said brother and attained a vested interest."

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(1) L. R. 6 H. L. 265, 282, 283.

(2) (1813) 1 V. & B. 422.

Now, there is nothing in the will to justify any interpretation of the language there used other than that which by settled undisputed usage the words bear. It is not arguable, reading the will alone, but that this was a gift for legitimate children. There were legitimate children of the person described as "my brother Walter," and on the construction of that will I feel no doubt, unless there is some other circumstance which we ought to look at, that the legitimate children are the only persons who can take.

Now questions of this kind have arisen, which have been dealt with and decided by the House of Lords, in judgments which are of the highest possible authority. You may find on the face of the will indications that the word "child" or "children" was used in a wider sense; you may find a reference to an illegitimate child, known to be a child of, say, Walter William Francis, so called as a child in the will itself. In that case, to use the language of Lord Cairns, which is so often cited, the will itself provides a dictionary, and if you find in the will itself a dictionary which tells you for the purpose of that document, and that document alone, whether a word is to have a meaning wider than its ordinary meaning, you give that meaning to it. There is another rule that, if you find, having regard to the surrounding circumstances, that it is impossible to give any effect to the will except by reading and giving the word a wider sense, you are driven in that case to give it a wider sense. As Lord Cairns said in the case of *Hill* v. *Crook* (1), "There are two classes of cases in which that prima facie interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest." He instances one case of a bequest "to children of my daughter Jane" who had died a spinster, and who had illegitimate children. Knowing the state of the family, the Court is driven to say that that is an extrinsic fact which it is justified in looking at, and to say it is impossible that this bequest could have any effect given

(1) L. R. 6 H. L. 265, 282.

to it, or any meaning attached to it, except on the footing that those children really take as personæ designatæ. But it is now sought to carry the matter further, and to say that in interpreting the will you are to consider it differently, according as it is or as it is not proved by extrinsic evidence that the testatrix believed that the illegitimate children were legitimate. I think there is no principle which can support that, and I am clearly of opinion that it is inconsistent with authority which is binding upon us.

Now, it is said here, and I will mention the material facts which raise the point, that the testatrix was induced to believe that these six illegitimate children were legitimate, because she wrote to her brother shortly before the will was made for the names of his children, and he sent a list of names of these six illegitimate children, some of whom were in Canada, and others in the United States of America, and others in various parts of the world. I will assume that, by reason of the statement made, and wrongly made, by her brother Walter William Francis to the testatrix, she was led to believe that these children were legitimate. Now, on principle, how can you say that you are to take extrinsic evidence of what was the testatrix's intention? You can only gather the intention from the language used in the will, and when I find that under the language of the will itself there are persons who fully answer the description "children or child of my said brother Walter William Francis" I have no justification for speculating as to what was the intention she had of benefiting these illegitimate children.

But, however that may be, I think that the authorities in the House of Lords of *Hill* v. *Crook* (1) and *Dorin* v. *Dorin* (2) leave us really no discretion in the matter. The language of Lord Cairns in the very leading judgment in the case of *Hill* v. *Crook* (1), where he lays down two rules, I think, amounts to this, that these rules are not only some of the rules which we have to apply, but are the rules, and the only rules, applicable to a case of this kind, namely, first if we find it is impossible that any legitimate children could take, and then he gives an example of that. Another example, which seems to me clearly and plainly to fall

(1) L. R. 6 H. L. 265.

(2) L. R. 7 H. L. 568.

under the first rule, and not under the second, was the case before Swinfen Eady J., as he then was, of *In re Eve* (1), having regard to the facts as found by the learned judge. Then Lord Cairns says (2): " The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." He then gives various instances of that, but I need not go through them, because there is here nothing which in any way assists the argument. Then he says (3): " If your Lordships had nothing more than this admitted statement of the state of the family and the habit of the testator with regard to the treatment of his grandchildren, that would, in my opinion, not have been sufficient. If, even with that statement, you found in the will merely a reference to the children of his daughter Mary, it would not, in my opinion, have been sufficient to refer to this statement of the fact with regard to the family, to entitle you to enlarge the term 'children' so as to include illegitimate children." Throughout that judgment, Lord Cairns seems to me to be quite clear upon this point, on the second rule, on the construction of the will itself: Does the will furnish a dictionary which enables you to go beyond the proper and ordinary meaning of the word? If there was any doubt about that, it seems to me to be made, if possible, clearer by the subsequent case of *Dorin* v. *Dorin* (4), which was certainly an extraordinarily hard case, because I cannot bring myself to doubt that the intention of the testator there had not effect given to it, but, nevertheless, it is none the less an important decision, because I am quite sure the learned Lords would, if they had felt themselves justified in so doing, have come to a different conclusion. In that case a man who had two illegitimate children by a woman before marriage, married her, and the day after his marriage made a will by which he bequeathed his property to his wife for life, with power to dispose of it between

(1) [1909] 1 Ch. 796.
(2) L. R. 6 H. L. 283.
(3) L. R. 6 H. L. 284.
(4) L. R. 7 H. L. 568.

"my children by her." He died soon afterwards, and there having been no legitimate children born, it was held by the House of Lords that those illegitimate children could not take under the will, because at the date of the will there was quite a possibility of legitimate children—children in the true sense of the word; the offspring of the marriage—coming into existence, and that being so, you could not have regarded that as meaning anything else. Lord Cairns adhered to the conclusions at which he had arrived in *Hill* v. *Crook* (1) and said (2): "According to those conclusions, I feel myself bound to ask whether, with a knowledge of the position, and what are called the surrounding circumstances, at the time the testator made his will, there is anything upon the face of the will which enables me to say that those who in the eye of the law were not his children, were intended by him to take under the general expressions used in his will . . . ." There was not, and there could not be, a doubt but that the testator there knew that these children were illegitimate; they were living with him and had been acknowledged by him. There is no doubt about that, but, nevertheless, Lord Cairns said he could not go into that question. He says: "I ventured to put to the learned counsel who argued the case at the Bar, this question: supposing that it had been in the mind of the testator, and we do not know and cannot know what his mind was except by his own expressions—supposing it had been in his mind not to take any notice of these children in his will, or to make any provision for them by his will, but to make a provision for them in some other way, and to use his will to designate merely his wife and any legitimate children who might be afterwards born, would not every word in the will be satisfied? Undoubtedly every word would be satisfied. Therefore, if that is so, you are not able to say that the will upon the face of it constrains you to depart from what is the ordinary and prima facie legal meaning of the word 'children.'"

Lord Hatherley reaffirms in language substantially identical the rules laid down by Lord Cairns, and I only refer to the passage in that judgment because some sort of doubt has been

(1) L. R. 6 H. L. 265.

(2) L. R. 7 H. L. 568, 573.

cast upon the meaning of the first rule. Lord Hatherley says (1): "The only mode in which the word 'children' can be made to bear a different sense from that which is its first legal and natural sense is this, that if you look to the outward circumstances as well as to the expressions contained in the will, and find that the outward circumstances of the case, combined with the expressions contained in the will, fail to give any adequate or intelligible sense to the will, then you have at once to arrive at the conclusion that the word 'children' has been used in some other or different sense. . . . ." As to the other judges, there is a passage in Lord Selborne's judgment in which he says (2): "I find no ground upon which it can be held that any repugnancy or inconsistency would result from giving to the word 'children' as used in the present will, its ordinary legal sense, and I therefore am compelled to concur in the judgment proposed by my noble and learned friend on the woolsack."

Now, it has been sought by Mr. Younger in his very ingenious argument to say that those were cases in which the testator knew and believed that the children were illegitimate and he did not use language sufficient to include them in the gift, and that they can have no application to a case where the testatrix believed, although contrary to the fact, that these children were legitimate. I can find no foundation whatever for that. When language is used which is satisfied by the existing state of facts, namely, that there are legitimate children, it would be dangerous to the last degree to hold—the testatrix having been misled as to the facts—that the language she has used was used in a non-natural sense. In my opinion it would be very wrong for us to lend any colour to that suggestion. I pause for a moment to consider whether it tells in favour of or against the appellants that the testatrix believed these children to be legitimate. I am rather disposed to think it tells against them, but, however that may be, I can see no ground for allowing that circumstance to vary our decision in this case.

Now, is there any authority for the appellants' contention? There is, in support of it, no doubt, the judgment of Joyce J. in

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(1) L. R. 7 H. L. 575.

(2) L. R. 7 H. L. 577.

In re Du Bochet (1), and as authorities have been cited, I will only refer to the way in which the question has been treated by Mr. Theobald in his book on Wills, 7th ed. at p. 290, where he puts the point most clearly: " Suppose the gift is to the children of A., a living person, and that there is nothing on the face of the will to show that existing or illegitimate children are intended, is the Court at liberty to infer from the surrounding circumstances that existing illegitimate children are intended to be included, for instance, from the fact that the testator believed A. to be married and was on terms of familiarity with his illegitimate children, whom he believed to be legitimate?" That states the proposition with perfect fairness. Then the author continues: "In *In re Du Bochet; Mansell* v. *Allen* (1), it was held that, under such circumstances, there was so strong a probability of it being the intention of the testatrix to use in her will the words 'children being daughters of my nephew Richard' as including two illegitimate daughters living at the date of the will, that a contrary intention could not be supposed. The case goes beyond any previous authority and appears to be inconsistent with many leading authorities. Strong probability is not enough."

There is a prior decision of North J., which was not cited before Joyce J., the case of *In re Brown* (2), in which, the facts being substantially the same, the learned judge laid down a rule which seems preferable, in every way, to that which was adopted by Joyce J. I shall not read in full either of the judgments, but of the two I think I am bound to say that *In re Du Bochet* (1) is wrong, and that the judgment of North J. in *In re Brown* (2) is right. Sargant J. has, in this case, given an extremely careful and elaborate judgment, and I am satisfied that this appeal should be dismissed.

SWINFEN EADY L.J. I am of the same opinion. The testatrix made a will in January, 1911, and she died in October of the same year. She gave her residuary estate upon trust to pay the income to her brother for life, and after his death in trust for his children or child "living at the death of the survivor of myself and my said brother and the children or child then living of any deceased child of his, who" &c.

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(1) [1901] 2 Ch. 441.

(2) 63 L. T. 159.

Before the will was made there had been a communication from the brother to the testatrix with regard to his family, and he sent her a memorandum as to his family, and this memorandum is headed "First wife," and then there is a column giving the names of the six children, and then in a separate column there are the names of the two children by the second marriage. It appears that the testatrix was under the impression that the first union was a marriage, and that her brother was married to the lady who passed as his wife. She is described in this document as his "first wife," so that the brother represented to the sister that she was his wife. Of the six children who are mentioned there, we have the birth certificates of two who were registered in Scotland, and they were registered as illegitimate children, and it is now beyond dispute that there was no marriage with this first lady, and that all the six children were illegitimate, although the testatrix believed them to be legitimate.

Then after the death of Harriet King, who was the mother of the six children and who died in August, 1900, the brother in January, 1904, married Rachel Simpson. That was the first and only valid marriage that the brother contracted, and there were two children of that marriage, Cecil and Laura, so that there were living at the death of the testatrix six illegitimate children and two legitimate children, making eight children in all. Applying that state of facts to the gift in the will, "in trust for all or any the children or child of my said brother Walter William Francis" there being legitimate children to take under that will, prima facie "children" means legitimate children, and, as has been pointed out by Lord Hatherley in the case of *Dorin* v. *Dorin* (1), "children" as much means legitimate children as if the word "legitimate" were introduced before the word "children." That is the rule. Now, the two exceptions to the rule are the two mentioned by Lord Cairns in the case of *Hill* v. *Crook* (2), one being "where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest." That does not apply here, because there are legitimate children to take. The other exception is where a testator has used nomenclature of which the will makes the meaning clear. The will supplies the dictionary from which you are to find the meaning of the terms he has used. Those are the two exceptions. Here there is nothing, on the face of the will, to indicate that the testatrix used the word "children" in any other than its natural sense, and it is not impossible that legitimate children can take, because it is admitted that there are legitimate children to take under the will.

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(1) L. R. 7 H. L. 568, 574.

(2) L. R. 6 H. L. 265, 282, 283.

That being the general rule and those being the two classes of exceptions to it, it was strongly urged that there may be other exceptions to the rule. The effect of *Hill* v. *Crook* (1) is, I think, to say this, that there is a general rule, and that there are two classes of exceptions, but it does not go on to say that there may not be a third class. The case of *Dorin* v. *Dorin* (2) in terms says that that cannot be so, and that the only two classes are the classes mentioned. Lord Hatherley said in *Dorin* v. *Dorin* (3), "The only mode in which the word 'children' can be made to bear a different sense from that which is its first legal and natural sense is this, that if you look to the outward circumstances as well as to the expressions contained in the will, and find that the outward circumstances of the case, combined with the expressions contained in the will, fail to give any adequate or intelligible sense to the will, then you have at once to arrive at the conclusion that the word 'children' has been used in some other or different sense . . . . " Then Lord Hatherley gives a similar illustration to the one Lord Cairns had given with regard to the child of a person who was dead. That makes it clear that the two exceptions to the general rule which are found in Lord Cairns' judgment in *Hill* v. *Crook* (4) are the only two exceptions; and the present case cannot be brought within either of those two exceptions.

Then it was urged by Mr. Younger and Mr. Martelli that it is obvious here that the testatrix meant to benefit the six children.

(1) L. R. 6 H. L. 265.
(2) L. R. 7 H. L. 568.
(3) L. R. 7 H. L. 575.
(4) L. R. 6 H. L. 282, 283.

The case was put in this way. It was said, believing them to be legitimate, as she did, she must have intended to include them, otherwise she would have excluded them by name, had she intended them not to take, or she would have limited her gift to the children by the second wife, and therefore it is obvious that she meant to benefit those six children. That, in my opinion, would be mere conjecture. I believe it might be said that she thought they would take under the description of "children of my brother"; she believing them to be legitimate thought they would take, because she thought they were legitimate children, and she believed that all legitimate children would take. But that is a wholly different thing from intending that they should take as personæ designatæ. The fact that the testatrix did not know of the illegitimacy is against the contention of the appellants; it excludes the idea that she meant to include them as personæ designatæ. Supposing, for instance, that she merely intended to benefit lawful children? What other language would she have used, or would not every word of the will be satisfied and full effect be given to the meaning, on the hypothesis that all she intended to do was to benefit lawful children? The law as laid down in *Hill* v. *Crook* (1) and *Dorin* v. *Dorin* (2) has not been extended and has not been altered. The case of *In re Eve* (3) was simply an application of the first exception laid down by Lord Cairns to the general rule. With regard to the conflict between North J. in the case of *In re Brown* (4) and Joyce J. in *In re Du Bochet* (5) in my opinion the case of *In re Brown* (4) was rightly decided, and is to be preferred.

Sometimes it has been said that you cannot have a class in which illegitimate children share with legitimate children. That is not well founded. You can have such a class. A testator, knowing of the illegitimacy, can by apt words treat the illegitimate as members of the class for the purposes of the will, and direct them to be so treated, as if they formed part of the class. It is quite easy to do that by properly drawing the will.

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(1) L. R. 6 H. L. 265.

(2) L. R. 7 H. L. 568.

(3) [1909] 1 Ch. 796.

(4) 63 L. T. 159.

(5) [1901] 2 Ch. 441.

Supposing the true facts of this case had been properly stated to the testatrix, it would have been quite easy for the draftsman to have provided for a gift of the residue between the six persons—naming them—and all the other children of her brother Walter. That would have been sufficient to include them in a class gift, and to make them, for the purposes of the class, members of the class. The unfortunate part of this case is that the brother of the testatrix did not truly state the facts to his sister, so that the draftsman of her will might make proper provision for the illegitimate children, if such had been the intention of the testatrix. In my opinion the judgment of Sargant J. was right. It would really be, as he said, mere conjecture if one were to say that these six children were intended to take. I think the appeal must be dismissed.

PHILLIMORE L.J. I am of the same opinion. This is a gift to a class and there are objects to satisfy it without introducing these six persons. The word "children" has a well established meaning in wills. The rule that it has that well established meaning is not a special rule as to children. It is, I conceive, a branch of the rule which says that there is a primary meaning, or, as Lord Cairns calls it, a prima facie interpretation, of the words denoting descent or relationship, and that prima facie intention holds the field unless it is displaced. The burden is upon those who seek either to extend it or to modify it. Now the two instances in which it can be extended or modified are the two rules given by Lord Cairns in *Hill* v. *Crook*. (1) As to the second rule we get no help from this will. If there had been mention of one of these children in the will as the son or daughter of the brother, or if there were mention of the brother's first wife by name and it could be proved that those children were to the knowledge of the testatrix only illegitimate sons or daughters, it would of course give us some help, but there is nothing in this will to indicate to us that the testatrix meant other than the ordinary legal meaning of the word "children." The one very slight indication which has been pressed by Mr. Martelli does not in my opinion carry any weight.

(1) L. R. 6 H. L. 265.

Then we come to the first rule, which is this: Where it is impossible in the circumstances of the parties that any legitimate children could take under the bequest. It is anything but impossible here; there are two children who will take under the bequest. But I go on. What does Lord Cairns take into account as the circumstances of the parties? The testator must be taken to have known the state of his family. I am not at all sure that that rule applies where the testator or testatrix has an incorrect belief as to the state of the family. That will some day have to be considered. At any rate I do not think this case is any better for the appellants because the testatrix did not know. It seems to my mind pure conjecture whether or not she intended to benefit these six children if they had not the status of legitimate children. She may have had no benevolent intention towards individuals at all; she may have simply had a general desire to benefit her brother's children. And if we get as far as that, it is quite as likely as not that her desire would be limited to legitimate children. Rightly or wrongly, wisely or unwisely, many people draw a very distinct line between the two classes, and we cannot tell whether if this testatrix had known the truth she would or would not have still left any money to any one of these six. Taking her mind as we may suppose it to be, that she believed what her brother told her, and as to that we cannot be quite certain, and that she believed that these six children were legitimate, we cannot tell whether she meant to benefit any one of the six as such as a persona, and if she did whether she meant to benefit one only or all the six, or some of the six, and if so which of the six. We cannot tell whether she had any intention to benefit any of them irrespective of that which she supposed to be their status. Therefore in my opinion it would be pure conjecture to decide in favour of these appellants.

I agree that the appeal must be dismissed, and I think I ought to add this, that all the cases with regard to the admission of illegitimate children to the position of legitimate children under wills are more difficult when the child is not the child of the woman and therefore obviously the natural child, but where the child is the reputed child of the man. I think it is desirable that I should say that I entirely agree with the rest of the Court that the judgment of Joyce J. in *In re Du Bochet* (1) is not to be considered as an authority.

Solicitors: *G. H. Barber & Son*; *Peacock & Goddard, for Mooring Aldridge & Haydon, Bournemouth: Crawley, Arnold & Co.*

W. I. C.

EVE J.
1913
Dec. 9, 10.

WHITTINGTON GAS LIGHT AND COKE COMPANY, LIMITED *v.* CHESTERFIELD GAS AND WATER BOARD.

[1912 W. 3120.]

Company—Local Government—Gas—"Main" or "service pipe"—Chesterfield Gas and Water Board Act, 1895 (58 & 59 *Vict. c. cxlvii.*), *s.* 4.

The defendants were incorporated under the Chesterfield Gas and Water Board Act, 1895 (58 & 59 Vict. c. cxlvii.), for the purpose of acquiring the undertaking of the Chesterfield Waterworks and Gas Light Company, and by s. 4 of that Act the limits for the supply of gas and water were to be the existing limits of the company, and it was provided that it should not be lawful for the defendants "to extend the existing mains of the company" for the supply of gas in the parishes of B. and W. unless with the previous written consent of the plaintiffs.

In 1912 the defendants, without obtaining such consent, laid a two-inch pipe, eighty-eight yards in length, from one of the mains in their own district along a street in the parish of W. in order to supply gas to one consumer. The plaintiffs, who were a limited company formed to supply gas in the parishes of B. and W., brought their action for an injunction to restrain the defendants from allowing this pipe to remain, and from laying any pipes in the said parishes contrary to the proviso in the Act:—

Held, (1.) that the proviso in the Act of 1895 was limited in its operation to mains properly so called and distinct from service pipes; (2.) on the question of fact, that the eighty-eight yards length of pipe was laid down and was being used as a service pipe only, sufficient to satisfy the estimated maximum requirements of the particular consumer; and the action must therefore be dismissed.

ACTION.

The plaintiffs were a limited company registered in 1864 under the Companies Act, 1862, and now manufactured and supplied gas in the parishes of Whittington and Brimington, in the county of Derby. The defendants were a board incorporated under the Chesterfield Gas and Water Board Act, 1895 (58 & 59 Vict. c. cxlvii.), for the purpose (among others) of acquiring the undertaking of the Chesterfield Waterworks and Gas Light Company. This company was originally incorporated by Act of Parliament in 1825 (6 Geo. 4, c. lxvi.) for the purpose of supplying gas within the town and borough of Chesterfield, and by the Chesterfield Waterworks and Gas Light Company's Act, 1855 (18 Vict. c. xxix.), the company was dissolved and re-incorporated for the purpose of manufacturing and supplying gas in Chesterfield and Newbold and other places; and by s. 12 of this Act the Gasworks Clauses Act, 1847, was incorporated with the Act of 1855. By the Chesterfield Waterworks and Gas Light Company's Extension Act, 1865 (28 Vict. c. xxxvi.), it was enacted by s. 5 that the Act of 1855 and the powers and provisions thereof should extend and apply to and include the parishes of Brimington and Whittington in such way and manner in all respects as if those places had been originally included within the limits, powers, and provisions of the Act of 1855, provided that it should not be lawful for the Chesterfield Company "to extend their mains" for the supply of gas in the parishes of Brimington and Whittington unless with the previous consent in writing of the Whittington Gas Company, Limited. By the Chesterfield Gas and Water Board Act, 1895, the undertaking of the Chesterfield Company and all their rights, powers, duties, and obligations were transferred to and vested in the defendants. By s. 4 of this Act it was provided that, subject to the provisions of that Act, the limits of that Act for the supply of gas and water should be the existing limits of the Chesterfield Company for the supply of gas and water respectively, that was to say the borough of Chesterfield, the district of the urban district of (among others) Whittington, and the parish of (among others) Brimington, "Provided that it shall not be lawful for the board to extend the existing mains of the company for the supply of gas in the parishes of Brimington and Whittington unless with the previous consent in writing of the Whittington Gas Company, Limited."

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(1) [1901] 2 Ch. 441.

By s. 42 of this Act the defendants were empowered to supply gas for the several purposes therein mentioned.

EVE J.

1913

WHITTINGTON GAS LIGHT AND COKE COMPANY, LIMITED v. CHESTERFIELD GAS AND WATER BOARD.

By s. 28 of the Chesterfield Gas and Water Board Act, 1911 (1 & 2 Geo. 5, c. xlv.), the limits of the defendants for the supply of gas were extended so as to include, in addition to the existing limits as defined by s. 4 of the Act of 1895, the several parishes therein mentioned; and it was provided that the defendants should have and might exercise within the said parishes all the powers conferred, and should be subject to all the obligations imposed by the Act of 1895 with reference to the gas undertaking. In November, 1912, the defendants, as the plaintiffs alleged, in contravention of the provisions of the Acts of 1895 and 1911, and without having obtained the previous consent of the plaintiffs, laid a two-inch pipe for the supply of gas running from and connecting with their existing main in Sheffield Road within the parish of Newbold under and along a street called Foundry Street in the parish of Whittington. This pipe, or extended main as the plaintiffs alleged it to be, was eighty-eight yards in length, and supplied gas to a foundry in the occupation of one Green, who paid part of the cost of laying the pipe. The plaintiffs alleged that the defendants were supplying gas by means of this pipe within the parish of Whittington, and intended to do so unless restrained; and the plaintiffs accordingly claimed an injunction to restrain the defendants from allowing the said "extended main" to remain, or from laying any pipe or pipes in Foundry Street, or elsewhere in the parishes of Brimington and Whittington, so as to constitute an extension of any existing gas main of the defendants, in contravention of the provisions of the Acts of 1895 and 1911; a mandatory order; and damages.

The defendants pleaded that the pipe in question was a "service pipe," laid in lawful exercise of the powers conferred by the above-mentioned Acts, and was intended to provide for the supply of gas to one customer only (Green); and, further, that the pipe was not of any greater capacity than was required for the purposes of such supply. The gasworks of the defendants were at a distance of three miles from Foundry Street, and there was evidence that the two-inch pipe in question was capable of supplying more gas than was at present required at the foundry. The defendants' fifteen-inch main in Sheffield

Road was outside the boundary of the parishes of Brimington and Whittington, but they had another and older main in Sheffield Road, and two smaller mains in Duke Street and Chapel Street, all within the parish of Whittington, and by means of service pipes from these mains gas had been supplied in that parish for many years past and forty-three consumers were now being supplied in the parish of Whittington.

Sir A. Cripps, K.C., and *Maugham, K.C.*, for the plaintiffs. If the defendants' contention is right they can supply all the best customers in the plaintiffs' district by means of long service pipes from their mains in Sheffield Road. That is against the spirit of the Act, which was passed to prevent the extension of the supply generally in the plaintiffs' district without their consent. The capacity of the pipe is the true test to apply, as to whether it is intended to be an extended main or a mere service pipe for the supply of one consumer. The various Acts contain no real definition of a "main." In the Chesterfield Waterworks and Gas Light Company's Extension Act, 1865, the word "mains" must be treated as equivalent to "pipes," as the object was to prevent the supply of gas in Whittington district without consent. In the general Act of 1871 (34 & 35 Vict. c. 41), in s. 11 the word "main" is used for the first time, and s. 24 provides for the supply of gas by the local authority within fifty yards of any of their mains.

In the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 14, there is a similar clause. But if the proviso in question in the Act of 1895 is not held to limit the further supply of gas in the plaintiffs' district without their consent, the restriction must be held to prohibit any further supply by connections not identical with those subsisting in 1895.

Younger, K.C., and *Joshua Scholefield*, for the defendants The defendants have in fact supplied gas within the parish of Whittington for many years past by means of service pipes from their mains, and this has been done without objection until now. The meaning of the Act of 1895 is clear. The existing mains properly so called were not to be extended without consent. The defendants' gasworks being three miles away, there is a perfectly

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complete commercial protection against supplying consumers at a distance from the mains by long service pipes, as the expense would be very great.

On the question of fact whether this pipe laid from the defendants' main to Green's premises is an extended main or a service pipe, on the evidence it can be nothing but a service pipe, as it supplies one consumer only. The distinction between mains and service pipes is drawn by the general Act of 1871 and the defendants' special Act of 1876, and is further emphasized by Lord Selborne in the case of *Milnes* v. *Huddersfield Corporation.* (1) The plaintiff must fail on the construction of the Acts and on the question of fact.

Sir A. Cripps, K.C., in reply. This pipe has certainly some if not all of the attributes of a main, (1.) from its position parallel to and not across Foundry Street and (2.) from its capacity. It can supply from the junction 450 cubic feet of gas per hour, whereas the present maximum required at Green's foundry is 400 cubic feet. So other consumers might be supplied from this pipe. The suggested objection that the cost of supplying consumers in our district would be prohibitive is quite illusory. We are entitled to the protection which the Act sought to give us. This fifteen-inch main from which the supply comes has not been shewn to have been an existing main in 1895, when the Chesterfield Gas and Water Board Act, 1895, was passed. The defendants must prove that fact in order to succeed.

EVE J. The dispute in this action gives rise to two questions, one of law and the other of fact; but, in the event of the former being determined according to the principal contention put forward by the plaintiffs, the latter does not arise. The question of law involves the true construction of a restrictive proviso imposed on the exercise by the defendants of their statutory power to supply gas in the parishes of Brimington and Whittington. The proviso is embodied in the concluding words of s. 4 of the Chesterfield Gas and Water Board Act, 1895, and is in these words: "Provided that it shall not be lawful for the board to extend the existing mains of the company for the supply of gas in the parishes of Brimington and Whittington unless with the previous consent in writing of the Whittington Gas Company, Limited." A proviso in nearly similar terms is to be found in s. 5 of the Chesterfield Waterworks and Gas Light Company's Extension Act, 1865, that being the Act whereby the predecessors in title of the defendants were first authorized to extend their limits of supply so as to include the two parishes named. As one would gather from the expression "to extend their mains" in the earlier Act, and the expression "to extend the existing mains of the company" in the later Act, there were existing in 1865 and in 1895, and there are still existing in the parishes in question some mains for the supply of gas belonging to the defendants' and their predecessors. From these mains situate in Sheffield Road, in that part of the road which is within the parish of Whittington, and in Duke Street and Chapel Street, both within the same parish, consumers for very many years past—upwards of fifty, as I gather—have been supplied with gas by means of service pipes connecting their premises with these mains. These connections have been made whenever required by an occupier entitled to demand a supply, without any consent of the plaintiff company, and the number of consumers so connected has fluctuated between a maximum of sixty-one in the years 1879 to 1881 and a minimum of six in the years 1894 and 1895. At the present time they number forty-three. In view of these facts it is difficult to understand why the plaintiffs have not intervened before this, if the proviso bends to the construction which I understood from the opening of the case was the principal construction sought to be put upon it by the plaintiffs, namely that the word "mains" is used in the proviso as the equivalent of "pipes," and that the true effect of the restriction was to prohibit any further supply of gas in the parishes by the defendants without their consent. It is as an alternative suggested that if the restriction is not so wide as this it at least operates to prohibit any further supply by connections not of a character for all practical purposes identical with those subsisting in 1895. I cannot accede to either of these contentions. In 1865, and certainly in 1895, the undertaking to which the defendants were then succeeding included two items of property quite distinct in character and in the purposes for which they were being used, the one the mains, that is to say the means by which, according to Lord Selborne in *Milnes* v. *Huddersfield Corporation* (1), the commodity was being brought into the streets from the source of supply, and the other the service pipes by which it was being conveyed from the mains to the individual consumers. In my opinion it is impossible to read the word "mains" in this proviso as covering both these items. The word "extend" is appropriate to mains, not to service pipes. If it had been intended to prohibit the making of further service connections or connections of a different character to those then subsisting, I feel satisfied that there would have been added to the word "extend" some such expression as "or to increase the number of," or some words indicative of the Legislature's intention to preserve as far as possible the status quo with regard to the number and character of consumers then connected and the means of connection. Moreover, as has been pointed out by Mr. Younger, the distinction between "mains" and "service pipes" had been clearly recognized many years before 1895 in the general Act of 1871, and in the special Act of the defendants' predecessors passed in the year 1876. I think the proviso means what it says, and that it is limited in its operation to mains properly so called and distinct from service pipes.

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(1) (1886) 11 App. Cas. 511, 522.

That construction renders it necessary for me to consider the question of fact. Is or is not the pipe by which the supply is being carried into Green's foundry a main? I have allowed Sir Alfred Cripps to address me in reply on a point which, in my opinion, is not raised by the pleadings and was not alluded to in his opening speech. I refer to the exception taken on behalf of the plaintiffs to the source from which the gas delivered at Green's foundry is drawn. It is drawn from the fifteen-inch main laid on the west side of the Sheffield Road, and outside the boundary of both of these parishes. There is nothing in the proviso to prevent the laying by the defendants of that main, and for the purpose of this action it is quite immaterial whether it was laid yesterday or ten, twenty, or fifty years ago. When the question of construction has been disposed of the real point between the parties is that raised in paragraphs 8 and 9 of the statement of claim, that is to say, is or is not the eighty-eight yards length of pipe between the fifteen-inch main and the entry into Green's foundry a main? Sir Alfred Cripps says that it possesses some if not all the characteristics of a main. Among them is the position in which it lies, not at right angles but parallel to the direction of the road. There is nothing in that. The premises to which the gas is conveyed have to be approached by the most economical and convenient route, and if such an approach involves the laying of a service pipe along and not across the road, it cannot, in my opinion, convert the service pipe into a main. The next and most important attribute relied on is the capacity of the pipe. It is pointed out that its capacity is such that it is able to deliver at the works a quantity of gas largely in excess of the present requirements of the consumer, an excess in capacity which leaves in this pipe a surplus of gas capable of being drawn upon to supply the other houses in the street, in front of which it runs. If and when the defendants tap this pipe for the purpose of supplying those houses an interesting question may arise as to whether they will not, by their act, be converting what was a service pipe into a main, but to-day I have to decide this dispute on matters as they now stand, and, on the evidence, I am quite satisfied that this pipe was laid down, is now being used, and is intended to be used, as and for a service pipe only. The responsible manager of the defendants' undertaking stated what he estimated would be the maximum requirements of the consumer after carefully examining his plant and equipment, and having done so in discharge of his duty to the board and to the consumer, he took care to provide such a service pipe as will, if the maximum requirements have to be met, be sufficient to satisfy it. There is really no substance in the action after the question of construction has been determined, and I dismiss it with costs.

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(1) 11 App. Cas. 511, 522.

Solicitors: *Cooper & Co., for Davies, Sanders & Swanwick, Chesterfield; Stevens, Son & Parkes, for Jones & Middleton, Chesterfield.*

G. M.

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Dec. 18.

1914

Jan. 20.

In re MAJOR.

TAYLOR *v.* MAJOR.

[1913 M. 2877.]

Will—General Charge of Debts (including Mortgage Debts)—Specific Devises of Incumbered and Unincumbered Realty—Later Clause devising particular Property on Trust for Payment of Debts—Exoneration—Locke King's Acts —Real Estate Charges Act, 1854 (17 *&* 18 *Vict. c.* 113), *s.* 1—*Real Estate Charges Act,* 1867 (30 *&* 31 *Vict. c.* 69), *s.* 1.

A testator commenced his will by saying "First I will that all my just debts (including mortgage debts) and funeral and testamentary expenses be paid and satisfied." He then gave a specific bequest of personalty to his son T., and six separate specific devises of realty to that son and his other children. Finally he devised other real estate and the residue of his personalty upon trust for conversion, and out of the proceeds to pay his just debts (including mortgage debts) and funeral and testamentary expenses, and to hold the balance for his sons and daughters equally. The values of the properties were as follows: Specific bequest to T., 1671*l.*; real estate specifically devised to the children, 17,110*l.*; personalty subject to final trust, 330*l.*; realty subject to that trust, 1170*l.* Part of the realty specifically devised was unincumbered; other parts were subject to various mortgages amounting to 7000*l.* The other, unsecured, debts amounted to 970*l.* It was conceded that the funds subject to the final trust, so far as they would extend, must be applied in payment, rateably, of the mortgage debts and the other debts and funeral and testamentary expenses:—

Held, (1.) following *Thomas* v. *Britnell* (1751) 2 Ves. Sen. 313; *Palmer* v. *Graves* (1837) 1 Keen, 545; and *Corser* v. *Cartwright* (1873) L. R. 8 Ch. 971, that the implied charge of debts created by the initial direction was explained and limited by the final creation of a definite fund for the purpose, and that no other part of the real estate than that comprised in it was charged with debts and funeral and testamentary expenses; (2.) that the proportion of mortgage debts not discharged out of the special trust fund must be borne by the various mortgaged properties, each bearing the balance of its own incumbrance; and (3.) that the proportion of the other debts and expenses not discharged out of the special fund must, as between the personalty specifically bequeathed to T. and the various specifically devised real estates, fall rateably on them in proportion to their values, which in the case of those which were incumbered would be the total value of each property less the proportion of mortgages on it not discharged out of the special fund.

Thomas Major, by his will, dated February 21, 1910, stated as follows: "First I will that all my just debts (including mortgage debts) and funeral and testamentary expenses be paid and satisfied." He next appointed his son Thomas Major the younger and his son-in-law, Henry Taylor (in the will called Leonard Taylor), trustees and executors, and gave to the former his business of a baker. Then the testator made the following six specific devises, namely, two shops and two pieces of land to Thomas Major the younger in fee simple; six messuages and a shop and bakehouse to his son Isaac Major in fee simple; eleven messuages and three cottages to his two married daughters Naomi Whittaker and Esther Hunt as tenants in common in fee simple in equal shares; two messuages and a shop and two pieces of land to his son George Major in fee simple; seventeen messuages and two shops to another married daughter, Clara Bentley, in fee simple; four villas and twenty-two messuages and factory and two pieces of land to his two daughters Louisa Major and Ada Taylor, the wife of Henry Taylor, as tenants in common in equal shares. Then the testator devised two other pieces of land and all other the real estate (if any and not thereinbefore devised) to which he should be entitled at his decease and bequeathed the personal estate and effects (not thereinbefore bequeathed) to which he should be entitled at his decease to Thomas Major the younger and Henry Taylor, "upon trust, as soon as conveniently may be after my decease, to sell, convert, and get in the same, and to stand possessed of and interested in the monies to arise and be produced thereby respectively, Upon trust in the first place to pay thereout my just debts (including mortgage debts), and funeral and testamentary expenses, and as to the residue of the monies" produced by such sale and conversion, upon trust to pay and divide the same unto and equally between his said sons and daughters, including Thomas Major.

The testator died on July 8, 1913, and his will was proved by the two executors. At the time of his death he had no real estate other than the buildings and pieces of land specifically mentioned in his will.

The specific bequest to Thomas Major the younger was of the value of 1671*l.* 4*s.* 8*d.*

The real estate specifically devised to Thomas and his brothers and sisters was of the value of about 17,110*l.* and was as to some parts unincumbered, and as to other parts subject to mortgages and charges amounting in all to 7000*l.* and interest.

There was no incumbrance on the property devised to George Major.

The personal property not specifically bequeathed was of the value of about 330*l.*

The land devised upon trust to pay debts was of the value of about 1170*l.*

The testator's debts (other than mortgage debts) amounted to about 970*l.*, of which all but about 200*l.* were trade debts due in respect of the business specifically bequeathed to Thomas Major.

An originating summons was taken out by Henry Taylor against the other executor and his brothers and sisters for the determination of the questions (1.) whether, according to the true construction of the will, the devisees to whom portions of the testator's real estates subject to mortgages were specifically devised were entitled to require that (*a*) the testator's personal estate not specifically bequeathed, and (*b*) the real estate expressly charged with payment of the testator's debts (including mortgage debts) and funeral and testamentary expenses, should be marshalled so as to be applied in part payment of the testator's mortgage debts, as well as in payment of his unsecured debts and funeral and testamentary expenses, or whether, as between the several specific devisees and legatees, the personal estate not specifically devised and the real estate charged with debts, &c., ought to be applied in the first place in payment of the unsecured debts and funeral and testamentary expenses, and the balance only towards payment of the mortgage debts; (2.) whether, in the last-mentioned event, the surplus of the testator's mortgage debts ought, as between the devisees of mortgaged estates, to be apportioned in proportion to the amount of the mortgage debts respectively, or in proportion to the value of the properties specifically devised, or in what other proportions; (3.) whether, according to the true construction of the will, the devisees to whom portions of the testator's real estates not subject to any mortgages were specifically devised were entitled to such estates respectively free from liability to provide for (*a*) the testator's unsecured debts and funeral and testamentary expenses and (*b*) the testator's mortgage debts charged upon other properties specifically devised, or whether the devisees of such unmortgaged properties had in respect thereof to bear any, and if so what, proportion of the said debts and expenses respectively; (4.) whether Thomas Major, in respect of the personal estate specifically bequeathed to him, was liable to bear any, and if so what, proportion of the testator's debts and funeral and testamentary expenses; (5.) generally, in what manner, as between the specific devisees and legatees, the testator's debts, including mortgage debts, and funeral and testamentary expenses, ought to be apportioned and borne.

C. Lyttelton Chubb, for the plaintiff, stated the facts and the questions raised by the summons.

[The first and second questions were not argued, it being conceded that the funds comprised in the special trust for payment of debts were applicable, so far as they would extend, in payment rateably of all the debts, including mortgage debts, and the funeral and testamentary expenses, and that a declaration to that effect would prevent the second question from arising.]

C. E. Shebbeare, for the defendants Thomas Major, Isaac Major, Naomi Whittaker, Esther Hunt, Clara Bentley, Louisa Major, and Ada Taylor. The operation of Locke King's Act (17 & 18 Vict. c. 113) is excluded under Locke King's Act Amendment Act, 1867 (30 & 31 Vict. c. 69), s. 1, by the reference in the direction in the first part of the will to mortgage debts. This direction is a general charge of all the debts (including mortgage debts) and funeral and testamentary expenses, not satisfied by the special funds for payment of these things in the latter part of the will, on all the property devised: *Shallcross* v. *Finden.* (1) The devisees must all contribute towards payment of all the debts, including mortgage debts: *Carter* v. *Barnadiston*,(2); *Irvin* v. *Ironmonger* (3); *Middleton* v. *Middleton.* (4) The later words of the will, specifically appropriating certain property to the payment of debts, including mortgage debts, and funeral and testamentary expenses, are not inconsistent with the general charge in the first part of the will: *Price* v. *North.* (1) In the cases there cited to the contrary the property specifically appropriated was not insufficient to pay the debts as in this case. If the later clause in the will is taken alone, Locke King's Act is only excluded to the extent to which the funds under that clause are sufficient to pay off mortgage debts: *In re Birch.* (2) But that does not affect the general creditors, who, after the appropriated property is exhausted, have a lien under the general charge in the first part of the will. If this general charge is available for the general creditors, it is good for the purposes of all parties concerned.

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(1) (1798) 3 Ves. 738.

(2) (1718) 1 P. Wms. 505.

(3) (1831) 2 Russ. & My. 531.

(4) (1852) 15 Beav. 450.

J. W. Manning, for the defendant George Major. Although, in the beginning of his will, the testator directs payment of debts and funeral and testamentary expenses, he does not there say out of what properties they are to be paid. At the end of his will he points out the property which is to be applied, at any rate in the first instance, in paying the debts and expenses. The intermediate specific bequest and devises do not shew that he had any intention to pool the properties given for payment of the mortgage debts. The charge given by implication by the preliminary direction could be destroyed, and may therefore be limited by the subsequent gift of certain specific property for payment of the debts and expenses: *Thomas* v. *Britnell* (3); *Douce* v. *Lady Torrington* (4); *Palmer* v. *Graves* (5); *Corser* v. *Cartwright* (6); *Wisden* v. *Wisden.* (7) Taking the will altogether, it is difficult to find the signification of "any contrary or other intention" within the meaning of Locke King's Acts.

[SARGANT J. Locke King's Acts seem to have little or nothing to do with the case.]

It is submitted that the property devised and bequeathed at the end of the will, for payment of debts and expenses, having been applied in payment, rateably, of unsecured debts and funeral and testamentary expenses on the one hand, and mortgage debts on the other hand, the balance of the former should be thrown rateably on the specifically bequeathed and specifically devised properties, and that each specifically devised property subject to a mortgage should bear the balance of the mortgage debt on that particular property.

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(1) (1841) 1 Ph. 85.
(2) [1909] 1 Ch. 787.
(3) 2 Ves. Sen. 313.
(4) (1833) 2 My. & K. 600.
(5) 1 Keen, 545.
(6) L. R. 8 Ch. 971.
(7) (1859) 5 Jur. (N.S.) 455.

C. E. Shebbeare in reply.

Cur. adv. vult.

1914. Jan. 20. SARGANT J. This originating summons relates to the order of application of the assets of the testator in the payment of his debts, and particularly of his mortgage debts, having regard to the provisions of his will.

The testator first declares that all his just debts (including mortgage debts) and funeral and testamentary expenses are to be paid and satisfied. He then gives a specific bequest to his son Thomas Major and makes six separate specific devises to this son and his other children. And finally, he devises certain other lands and all other, if any, his real estate, and bequeaths the residue of his personal estate, upon trust for sale and conversion, and to stand possessed of the proceeds upon trust, in the first place, to pay thereout his just debts (including mortgage debts) and funeral and testamentary expenses, and to hold the balance for his sons and daughters equally.

The specific bequest to Thomas Major was of the value of 1671*l.* 4*s.* 8*d.* The real estate specifically devised to him and his brothers and sisters is estimated as worth some 17,110*l.* 10*s.*, and was, as to some parts thereof, unincumbered, and, as to other parts thereof, subject to various mortgages and charges amounting in all to 7000*l.* and interest. The personal property of the testator not specifically bequeathed was of a total value of about 330*l.*, and the lands devised upon trust to pay debts, which appear to have consisted only of those specifically described in that part of the will, were of the value of some 1170*l.* The testator's debts, other than mortgage debts, amounted to about 970*l.*, of which all but about 200*l.* were trade debts due in respect of the business specifically bequeathed to his son Thomas Major.

The first question raised by the summons is whether the real and personal estate comprised in the express trust for payment of debts (hereinafter referred to as the express trust fund) should be applied primarily in the payment of the unsecured debts and funeral and testamentary expenses, and only secondarily in payment of the testator's mortgage debts. This question was, however, too clear for argument, and was not in fact argued before me. Under this head I make a declaration that the funds in question are applicable, so far as they will extend, in payment rateably of all the debts, including mortgage debts, and the testator's funeral and testamentary expenses. This declaration also disposes of the second head of the summons, or rather prevents the question there stated from arising.

The really important head of the summons is the third, which is in the following terms : [His Lordship read the third question, and continued :] The question here stated seems to me to have been quite properly drawn in the first instance, but, having regard to the answer I have already given to the first question, it is clear that much the larger part of the testator's unsecured debts and of his funeral and testamentary expenses (namely, that part thereof not discharged out of the express trust fund) must be discharged out of his other assets, including the real estate specifically devised to his children. And the real question, therefore, is with reference to that large proportion of the mortgage debts not discharged out of the express trust fund, and is, whether, on the one hand, the proportion of each mortgage debt is left to fall, in the ordinary course, on the property subject to the particular mortgage, or whether the words of the will are strong enough to throw all the mortgage debts on all the properties, and to make the properties a common fund for the rateable discharge, inter se, of the whole mortgage liability.

After careful consideration, and with the assistance of the clear arguments of counsel on both sides, I have come to the conclusion that the words of the will are not sufficiently strong for the purpose. I base this conclusion on the view that the case is within *Thomas* v. *Britnell* (1) and *Palmer* v. *Graves* (2), as approved in *Corser* v. *Cartwright* (3), rather than within *Price* v. *North* (4); and that the implied charge of debts created by the initial direction in the will is explained and limited by the subsequent creation of a definite fund for the purpose out of (inter alia) some part of the real estate which would otherwise have been subject to the initial charge; and, accordingly, that the will, on its true construction as a whole, does not charge with debts and funeral and testamentary expenses any part of the real estate of the testator other than that forming part of the express trust fund. But I should add, though this is not the actual ground of my decision, that, even if I had thought that the will did contain a charge of debts on the whole of the testator's real estate, I should have felt great difficulty in holding that the words were strong enough to result in pooling the various specifically devised properties and making them a common fund for the discharge of the total amount of the mortgages on them.

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(1) 2 Ves. Sen. 313.

(2) 1 Keen, 545.

(3) L. R. 8 Ch. 971, 974.

(4) 1 Ph. 85.

The result is that the proportion of the mortgage debts not discharged out of the express trust fund will remain merely as charges on the separate mortgaged properties, and that the proportion of the other debts and of the funeral and testamentary expenses not discharged out of the express trust fund will, as between the various specifically devised hereditaments, fall rateably on them in proportion to their values, these values being ascertained, in the case of such of them as are subject to mortgages or charges, on the total value of each property less that proportion of its mortgages or charges not discharged out of the express trust fund.

As regards the fourth head of the summons, it is clear, and indeed no contrary argument was put forward, that the personal estate specifically bequeathed to the defendant Thomas Major must contribute, rateably with the specifically devised real estate, to the payment of the proportion of the debts and funeral and testamentary expenses not discharged out of the express trust fund.

This appears to me to answer all the questions raised by the fifth head of the summons.

The costs of all parties must be taxed as between solicitor and client, and will form part of the testamentary expenses and be borne in the manner above indicated.

Solicitors for all parties: *C. J. Mander & Sons, for Watts & Bouskell, Leicester.*

F. E.

C. A.
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Dec. 9, 10.

BEBB *v.* LAW SOCIETY.

[1913 B. 305.]

Solicitor—Profession—Admission of Women—Disqualification—Inveterate Usage—Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 48.

Before the passing of the Solicitors Act, 1843, women were by the common law of England under a general disability, by reason of their sex, to become attorneys or solicitors. That disability can be, and is, proved by inveterate usage. It could not be removed by a mere interpretation clause, such as the Solicitors Act, 1843, s. 48, which provides that words importing the masculine gender shall extend to a female. There is nothing in the Solicitors Act, 1843, or any amending statute which can be construed as giving women any new right to become solicitors. The disability therefore continues, and the Law Society cannot admit any woman to their preliminary examination with a view to her becoming a solicitor.

Decision of Joyce J. affirmed.

The plaintiff in this action, a spinster, in December, 1912, filled up and sent to the Law Society a form of notice, issued by the Society, of her intention to present herself at their preliminary examination on February 5 and 6, 1913, with a view to becoming bound by articles of clerkship and ultimately being admitted as a solicitor. She enclosed the requisite fee. The Society returned the fee, and informed her that if she presented herself for examination she would not be admitted, giving the reason that she was a woman, and therefore could not be admitted as a solicitor of the Supreme Court.

The plaintiff then brought this action against the Law Society asking for a declaration that she was a "person" within the meaning of the Solicitors Act, 1843, and the Acts amending the same, and that she ought not to be refused admission to the preliminary examination, and for a mandamus directing the defendant Society to admit her to the examination, or alternatively for an injunction restraining them from refusing to admit her.

The Law Society put in a defence that the refusal to admit the plaintiff to the examination was in accordance with law, and that the statement of claim shewed no cause of action.

The action came before Joyce J. on July 2, 1913.

Buckmaster, K.C., and *R. A. Wright* appeared for the plaintiff.

Hughes, K.C., and *T. J C. Tomlin* appeared for the defendants.

Joyce J. dismissed the action.(1)

The same arguments were used as in the Court of Appeal and Joyce J. founded his judgment upon the same reasons as are more fully set out in the judgments delivered in the Court of Appeal. It has therefore not been thought necessary to set out the arguments and judgment in the Court below.

Lord Robert Cecil, K.C., and *R. A. Wright*, for the appellant. Unmarried women are not disqualified from being admitted as solicitors. They have prima facie the same legal rights as men; at common law there is nothing to prevent women from being admitted as solicitors; and the statutes on the subject, fairly construed, favour the right of women to be admitted. In Pollock and Maitland's History of English Law, 2nd ed. vol. i. p. 485, it is stated that "as regards private rights women are on the same level as men, though postponed in the canons of inheritance; but public functions they have none. In the camp, at the council board, on the bench, in the jury box there is no place for them." We accept that statement, but the words "public functions" must be defined narrowly. Women have filled many public offices; for instance, there have been Queens of England, and women have been regents; Queen Eleanor acted as Keeper of the Great Seal: Lord Campbell's Lives of the Lord Chancellors, 3rd ed. vol. i. p. 140. Women could hold any office of which they could perform the duties by deputy; for instance the daughter of the Duke of Buckingham acted as Constable of England: *Duke of Buckingham's Case.*(2) A woman could be Marshal and Great Chamberlain. *Rex* v. *Stubbs* (3), where a list of offices held by women is given; governess of a workhouse:

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(1) [1913] W. N. 209.

(2) (1569) Dyer, 285 b.

(3) (1788) 2 T. R. 395, 397.

Anon. (1); sexton: *Olive* v. *Ingram* (2); churchwarden: *Gordon* v. *Hayward.* (3)

[PHILLIMORE L.J. referred to *Shaw* v. *Thompson.* (4)]

There was no absolute rule against women holding any office of which they were capable of performing the duties. They were excluded from military offices, and if they succeeded to any hereditary military office were allowed to appoint deputies. They were not allowed to vote at an election of a member of Parliament for a borough: *Chorlton* v. *Lings* (5); but that depended on the construction of the Representation of the People Act, 1867, and does not shew that women cannot hold a public office. It has been held that women are incapacitated from serving as members of a county council: *Beresford-Hope* v. *Lady Sandhurst.* (6) That decision cannot be right, for it would prevent the appointment of women as post office clerks, or factory inspectors under the Factory and Workshop Act, 1901, ss. 118, 120.

There is no special rule that solicitors must be of the male sex. The manner in which attorneys came to occupy a recognized position is stated in Pollock and Maitland's History of English Law, 2nd ed. vol. i. pp. 212, 213. A woman could act as attorney of her husband: Year Book 13 Edw. 3, Rolls Series, p. 186; and there is nothing in any of the old authorities to shew that a woman could not act as attorney for anybody. On the contrary they did so act: Year Book 18 Edw. 3, Rolls Series, Introduction by L. O. Pike, p. xxxviii.; Select Civil Pleas, published by the Selden Society, vol. i. p. 56, pl. 141; Co. Litt. 52a, 128a. At first anybody could act as attorney, but the practice has since been regulated by statute, beginning in 1322 with 15 Edw. 2, c. 1. Attorneys could only appear in certain Courts and places and counties: Bracton's Notebook by Maitland, vol. ii. p. 283, case 342; vol. iii. p. 335, case 1361. The statutes 4 Hen. 4, c. 18, 33 Hen. 6, c. 7, 3 Jac. 1, c. 7, 6 Geo. 2, c. 27, and others have been passed with respect to attorneys, but they contain nothing which can exclude women. The present position was established by the Solicitors Act, 1843, by which every one who complies with the conditions is entitled to be admitted. Sect. 2 speaks of a "person," which includes women. By s. 48 words importing the masculine gender are to apply to a female. The Interpretation Act, 1889, is to the same effect. Therefore women have a right to be admitted unless there was before that date an absolute rule of law disqualifying them. We do not say that the Act of 1843 gave women any fresh rights, but that it recognized their old privileges as did s. 26 of the Solicitors Act, 1860. Examinations by the Law Society were instituted by the Solicitors Acts, 1877 and 1894. Women are permitted to practise as solicitors in many of our colonies and in foreign countries. There is nothing in any of the Acts of Parliament to deprive them of their right to practise here. The general course of legislation is in their favour, e.g., Municipal Corporations Act, 1882, ss. 9, 63; Solicitors Act, 1888, ss. 2, 10; Representation of the People Act, 1832, ss. 19, 20; Juries Act, 1870, s. 5. There is no reason in the nature of things why women should not practise, and the plaintiff is a particularly capable person. A solicitor does not discharge public functions, so there is no objection on that ground: *Hurst's Case* (1); *In re Dutton.* (2) We admit that married women have always been in a different position and have not been treated as entitled to equal rights with men: *Reg.* v. *Harrald* (3); *Pharmaceutical Society* v. *London and Provincial Supply Association.* (4)

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(1) (1703) 2 Ld. Raym. 1014.

(2) (1738) 7 Mod. 263.

(3) (1905) 21 Times L. R. 298.

(4) (1876) 3 Ch. D. 233.

(5) (1868) L. R. 4 C. P. 374.

(6) (1889) 23 Q. B. D. 79.

Sir Robert Finlay, K.C., *Hughes, K.C.*, and *Tomlin, K.C.*, for the Law Society. It is not suggested the Solicitors Act, 1843, conferred any new rights on women, and it is clear that they never acted as solicitors before that date. The practice which has been followed for hundreds of years is a conclusive answer to the appellant's claim. Ever since attorneys have been established as a profession women have been deemed to be disqualified to act as attorneys. That is a circumstance of the greatest possible weight: *Hall* v. *Incorporated Society of Law Agents* (5); *Miss Bertha Cave's Case.* (6) Women have never been barristers or solicitors. In Co. Litt. 52a and 128a

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(1) (1662) 1 Lev. 75.
(2) [1892] 1 Q. B. 486.
(3) (1872) L. R. 7 Q. B. 361.
(4) (1880) 5 App. Cas. 857.
(5) (1901) 3 F. 1059.
(6) (1903) *The Times*, Dec. 3, 1903.

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it is stated plainly that women cannot be attorneys, and the Mirror of Justices, attributed to Andrew Horne (ed. Whittaker, Selden Society, p. 88), is said to be an authority for that statement. The Solicitors Act, 1605 (3 Jac. 1, c. 7), s. 2, confirms this view; and the schedule to the Stamp Act, 1815 (55 Geo. 3, c. 184), in referring to ordinary apprenticeship speaks of the "master or mistress," but refers to the "master" only in articles of clerkship to an attorney. There is nothing in the Solicitors Act, 1843, which confers on women the right to become solicitors. Sects. 35 and 48 are not sufficiently explicit. By Lord Brougham's Act (13 & 14 Vict. c. 21), s. 4, words importing the masculine gender are to include females; but there was something in the subject repugnant to the application of that section inasmuch as women never had been solicitors. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1, is to the same effect; moreover it does not apply to the Act of 1843. The question is settled by long usage: *Chorlton* v. *Lings* (1); *Jex-Blake* v. *Senatus of Edinburgh University* (2), where it was held that females could not be students or graduates of that university on the ground of inveterate usage.

On this point the law was altered by the Universities (Scotland) Act, 1889 (52 & 53 Vict. c. 55), s. 14, sub-s. 6, which enabled the commissioners thereby appointed to make ordinances enabling any Scottish university to admit women to its degrees. But it was held by the House of Lords in *Nairn* v. *St. Andrews University* (3) that women who had been admitted to degrees under that Act could not exercise the parliamentary franchise for the university, because the Legislature could not have intended in so indirect a way to make so great a change in law established by inveterate usage.

De Souza v. *Cobden* (4) is a very strong case, for a woman had actually been elected to a county council, and no one had objected for a year, but the Court of Appeal held that she was liable to the penalties imposed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 41, which is incorporated with the Local Government Act, 1888 (51 & 52 Vict. c. 41), under which

(1) L. R. 4 C. P. 374.
(2) (1873) 11 M. 784.
(3) [1909] A. C. 147.
(4) [1891] 1 Q. B. 687.

she had been elected, for acting as a member of the council when disqualified.

The office of attorney or solicitor became a public office as soon as a body was constituted to inquire into the qualifications of applicants. That was done in 1729 by 2 Geo. 2, c. 23, and from the date of that Act the admission of a solicitor qualified him for holding other offices which were unquestionably public, e.g., a master. *Hurst's Case* (1) appears to have been many times before the Court, but the two latest reports in Keble (2) shew that the Court was dealing with the case of an attorney in inferior Courts, not in the Court of Common Bench.

The only solicitors originally were the six clerks in Chancery. Perhaps in very early times they could look after the conduct of the cases, but later the work was done by their deputies. They were known in early times as the six bachelors. In the time of the Commonwealth their number was increased to sixty. (3) The statute 14 & 15 Hen. 8, c. 8 (1523), permitted them to marry. The first statutory mention of solicitors is in 3 Jac. 1, c. 7 (1605). But they were first regulated as a profession by 2 Geo. 2, c. 23, which first required articles of clerkship: see Christian, Short History of Solicitors, p. 111; Kerly, Historical Sketch of the Equitable Jurisdiction of the Court of Chancery, p. 267.

[PHILLIMORE L.J. All the clerks of Chancery were originally in orders of some sort and so were necessarily men.]

During all the centuries for which attorneys and solicitors have been admitted and enrolled there is no case of a woman being admitted, or, so far as can be discovered, of having applied to be admitted.

Lord Robert Cecil, K.C., in reply. Apart from previous history the Act of 1843 would give women a right to be attorneys, just as the Factory Acts gave them a right to be inspectors, unless there was a general disability in women to be attorneys before the Act. The burden is upon the respondents to shew that there was such a general disability in English law and they have not shewn it. In the passage quoted from Co. Litt. 128a, Lord Coke is not expressing his own opinion, but merely quoting from the Mirror of Justices, a work of no authority. (1) At 52a Coke had said that even femes covert could be attorneys to deliver seisin; and in the note to that passage Mr. Hargrave translates "femmes" in the passage from the Mirror as "femes covert."

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(1) 1 Lev. 75.

(2) (1663, 1664) 1 Keb. 558, 675.

(3) "Common solicitors" were then inferior to attorneys. See the Rules and Orders for the Court of the Upper Bench at Westminster . . . . (of Michaelmas Term, 1654), Lond. 1655. P. 4, r. 5. "That for the future Common Solicitors be not admitted to practice in this Court, unlesse they are admitted Attornies of either Bench . . . ." (but the qualification for admittance as an attorney of the Court was service either as a common solicitor or as a clerk for five years, r. 6). Cp. Christian, A Short History of Solicitors (1896), pp. 73 seq.—F. P.

The only point the respondents make is inveterate usage. But the doctrine of inveterate usage in English law applies only to positive usage, as of merchants.

The cases as to the parliamentary vote are different; any one could vote if the law allowed him. Attorneys from the earliest times required an education which very few women in those times received, and those who did were rich ladies not likely to wish to become attorneys.

In *Jex-Blake* v. *Senatus of Edinburgh University* (2) thirteen judges gave their opinions; six were in favour of the women, seven against them, and Lord Neave founded his opinion wholly on Roman law, which is a good ground in Scotland, but not in England. The case of barristers is different, for the Inns of Court always had a discretion as to whom they would call, subject to an appeal to the judges: *Rex* v. *Benchers of Gray's Inn* (3); *Rex* v. *Benchers of Lincoln's Inn.* (4) No one has a right to be admitted as a student of any of the Inns.

COZENS-HARDY M.R. This appeal raises a very important point as to the right of a woman to be admitted to the profession of a solicitor. It arises in this shape. The plaintiff seeks a mandamus, or an order in the nature of a mandamus, requiring the Law Society to admit her to the preliminary examination. Now the Law Society, of course, is a modern creation of statute. The right which the plaintiff claims against the Law Society depends upon the Act of 1843; and the argument which has been adduced to us is, shortly, this: Read that Act from beginning to end, and you find that certain statutory obligations are imposed upon the Law Society requiring them to admit any person who comes forward and complies with certain conditions. The plaintiff says, if you look at the end of the Act, namely, s. 48, you will see that "every word importing the masculine gender only shall extend and be applied to a female as well as a male" unless "there be something in the subject or context repugnant to such construction."

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(1) The marginal reference to the Mirror in Co. Litt. is wrong and the spelling of the extract corrupt.—F. P.

(2) 11 M. 784.

(3) (1780) 1 Doug. 353.

(4) (1825) 4 B. & C. 855.

Now, it has not really been contended, even if some ambiguous language was used at first by Lord Robert Cecil in his very able argument, that there is anything in the Act of 1843 which destroyed or removed an existing disability, and, in my opinion, all we have to consider here is whether, at the date of the passing of this Act, a woman was under a disability to become an attorney or a solicitor. Now three grounds at least have been alleged to prove such disability. In the first place it is said Lord Coke, in language which, I am bound to say, seems to me not to be as doubtful as has been suggested, 300 years ago said that a woman is not allowed to be an attorney. We have been told that we ought not to pay much attention to that, because Lord Coke refers to the Mirror in this way (Co. Litt. 128a): "Now what manner of men attorneys ought to be, or rather what they ought not to be, heare what antiquity hath said," and then he quotes a passage from the Mirror which expresses that women cannot be attorneys. He was speaking of attorneys, not in the old form in which that phrase might be used, but as attorneys as a professional body regulated by statute. In the very preceding passage he says: "so as the statutes that give the making of attorneyes, have worne out responsales," who were a sort of quasi attorneys. He was, therefore, plainly in the observation which I have referred to, dealing with the profession of attorneys, which profession has been recognized by statute, or was to a large extent, perhaps, created by statute, between 400 and 500 years ago. The Mirror may not be, and I think is not, a work of the highest possible authority (1), but the reference to

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(1) See Maitland's introduction to the Selden Society's edition.—F. P.

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the Mirror, and seeing what antiquity has said, does not in the least, in my view, take away from the opinion of Lord Coke, and the opinion of Lord Coke on the question of what is or what is not the common law is one which requires no sanction from anybody else; therefore I think that that alone is evidence of what the common law was, and that there was, at common law, a disability on the part of a woman to be an attorney-at-law.

Then, apart from what Lord Coke says, what have we? In the first place, no woman has ever been an attorney-at-law. No woman has ever applied to be, or attempted to be, an attorney-at-law. There has been that long uniform and uninterrupted usage which is the foundation of the greater part of the common law of this country, and which we ought, beyond all doubt, to be very loth to depart from. I cannot, therefore, but think, although we have listened to a most interesting discussion as to what women can do, and to what extent the office of a solicitor is a public office, and to what extent it is a mere private office, that that discussion is, really, beside the mark.

I decide the case simply on the ground that, in my opinion, there was, at the date of the passing of the Act of 1843, a disability on the part of a woman to be an attorney, and that, that being so, the Act of 1843 confers no fresh and independent right, because it does not destroy a pre-existing disability. We have been asked to hold, what I for one quite assent to, that, in point of intelligence and education and competency women—and in particular the applicant here, who is a distinguished Oxford student—are at least equal to a great many, and, probably, far better than many, of the candidates who will come up for examination, but that is really not for us to consider. Our duty is to consider and, so far as we can, to ascertain what the law is, and I disclaim absolutely any right to legislate in a matter of this kind. In my opinion that is for Parliament, and not for this Court.

The appeal must, in my opinion, be dismissed with costs.

SWINFEN EADY L.J. I am of the same opinion. The very able and most interesting argument that has been addressed to the Court by Lord Robert Cecil has entirely failed to convince me that the profession of a solicitor is now open to women. The origin of the profession has been traced during the course of the argument. It has been pointed out that, anciently in England, the parties had to appear to a suit in person, and had not the privilege of appearing by any one else. Lord Coke points that out; he says that (1) "by the common law, the plaintiff or defendant, demandant or tenant, could not appeare by attornie without the King's special warrant by writ or letters patents, but ought to follow his suite in his own proper person (by reason whereof there were but few suits)." That was the ancient common law. Then, gradually, in course of time, the profession of an attorney arose; the exact date when there were attorneys by profession has not been made to appear, but they certainly existed as early as 1402, and before that date, because it is in that year, the 4th Hen. 4, that a statute, c. 18, was passed governing attorneys. That statute, after reciting that sundry damages and mischiefs have ensued to divers persons "by a great number of attornies, ignorant and not learned in the law, as they were wont to be before this time," proceeds to enact "that all the attornies shall be examined by the justices, and by their discretions their names put in the roll," or in roll, "and they that be good and vertuous, and of good fame, shall be received and sworn well and truly to serve in their offices, and especially that they make no suit in a foreign county"; i.e., a county other than that in which they are to practise, "and the other attornies shall be put out by the discretion of the said justices." That is the earliest statute to which our attention has been called which refers to a roll, the examination of attorneys, and putting out unsuitable persons. That was upwards of five centuries ago, and from that time to the present, although the position of an attorney has developed, no instance of any woman attorney has, I will not say been brought to our knowledge, but, as far as it is known, ever existed. Then Lord Coke, after dealing with the passage to which the Master of the Rolls has referred (1), says: "Now what manner of men attorneys ought to be, or rather what they ought not to be, heare what antiquity hath said." Then he quotes from the Mirror: "Fems ne poient estre attorneyes." In my opinion that means women cannot be attorneys; it is not restricted to married women, but is comprehensive, women cannot be attorneys. It is said the authority of the Mirror is impugned. But the authority of Lord Coke is not; and this is a statement that Lord Coke makes, quoting the Mirror, without any dissent whatever from it, but laying it down that that is what the law is which has come down from antiquity, women cannot be attorneys. That was in his time, and then, from that time continuously to the present, there is no instance of any woman being an attorney. Now what is the effect in England of long-continued usage, usage through the centuries without departure in any single instance? Bovill C.J. in *Chorlton* v. *Lings* (1), which is quoted by Lord Ormidale in *Jex-Blake* v. *Senatus of Edinburgh University* (2), puts it in this way. After referring to certain exceptional instances, he says: "But these instances are of comparatively little weight, as opposed to uninterrupted usage to the contrary for several centuries; and what has been commonly received and acquiesced in as the law raises a strong presumption of what the law is, and at least throws upon those who question it the burthen of proving that it is not what it has been so understood to be." In the recent case of the claim of women to vote, being graduates of the University of St. Andrews, the case of *Nairn* v. *St. Andrews University* (3), Lord Loreburn, then Lord Chancellor, stated the law in this way. He said: "It is incomprehensible to me that any one acquainted with our laws or the methods by which they are ascertained can think, if, indeed, any one does think, there is room for argument on such a point. It is notorious that this right of voting has, in fact, been confined to men." Of course he is speaking of voting for a parliamentary representative. "Not only has it been the constant tradition, alike of all the three kingdoms, but it has also been the constant practice, so far as we have knowledge of what has happened from the earliest times

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(1) Co. Litt. 128a. [Coke, according to his frequent habit, felt bound to support his living knowledge of practice by citing an apocryphal authority.—F. P.]

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(1) L. R. 4 C. P. 374, 383.

(2) 11 M. 784, 814.

(3) [1909] A. C. 147, 160.

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down to this day. Only the clearest proof that a different state of things prevailed in ancient times could be entertained by a Court of law in probing the origin of so inveterate an usage. I need not remind your Lordships that numberless rights rest upon a similar basis. Indeed, the whole body of the common law has no other foundation." In my opinion, it is sufficient to rest this case upon the inveterate practice of the centuries that, ever since attorneys as a profession have existed, women have never been admitted to the office, and, in my opinion, that shews what the law is and has been. For these reasons, I am of opinion that the present applicant is not entitled to insist that she has a right to be examined by the Law Society with a view to her entering the profession of solicitors.

We have only to determine what the law is, and if there is to be any change from the ancient practice, it is a change which must be effected by Parliament, and the law must be altered. The appeal fails.

PHILLIMORE L.J. I am of the same opinion. We are not here to say what should be the law, and I disclaim any expression of opinion one way or another as to what should be the law on this subject. Our function is to declare the law; and our first function is to declare the common law of the country. No doubt, in the multiplicity of recent statutes, on many occasions our functions are limited to construing modern statutes, but our first duty is to declare the common law of the country, and we declare that common law according to what we ascertain to be the received inveterate usage of the country. It is in that way that I approach this case.

Now in early days, as researches of counsel have pointed out, when there was no profession of attorney, and when, indeed, except under Royal favour, everybody had to follow his suit in person, no doubt—particularly when, perhaps, the husband might be following the King's suit at war in another country—a woman was occasionally appointed the attorney or representative of a litigant, just as a woman may have a power of attorney to perform acts of conveyancing at the present day, but from the time that attorneys have become a profession, which may be dated

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back at least to the statute of the 4th Henry IV., and from the time that solicitors had become a profession, which may be dated back at least to the statute of 3rd James I., there is no instance of a woman ever being, or its being considered possible that a woman should be, an attorney or a solicitor. Till solicitors received their professional position, I apprehend that the only professional representative or agent of a litigant in the Court of Chancery was one of the six or sixty clerks in the Court of Chancery. It is obvious from the statute that Mr. Hughes has quoted and from other sources that they were always men, because they were always, at least, in minor orders. I have not heard it suggested that the corresponding law agents in the Ecclesiastical and Admiralty Courts, the proctors, were other than men. There is, therefore, a consensus of usage that the law agents of clients in all the Courts of this country have always been men. Lord Coke's quotation from the Mirror is incorrect; the Mirror itself may be of very small value; but the point lies not in the accuracy of the quotation or in the respectability of the authority quoted, but in the incidental statement of Lord Coke's view, and Lord Coke's view is quite clear that women cannot be attorneys. It has been suggested in the Court below that the word "femmes" was appropriate to femes covert, and that the proper word for women generally was mulieres. That has been disclaimed here. Sir Robert Finlay pointed out its almost grotesque incorrectness, and I need say nothing more about it. It is, therefore, clear that Lord Coke so thought. He is only a witness, no doubt, as to the common law, but he is a witness of the highest authority. The Stamp Act of 55 Geo. 3, c. 184, is only evidence again, but it is evidence of weight. But there is no evidence the other way at all; all the evidence teaches us that there is an inveterate usage to the effect that this is a profession which has not been hitherto open to women; and the same arguments which can be applied to destroy the evidence might equally well have been applied, notwithstanding Lord Robert Cecil's distinction, to the claimants to parliamentary franchise or to municipal franchise, till municipal franchise was granted to women. The cases as to women holding certain parochial offices have been distinguished, on the very occasions when the possibility of their holding them has been upheld, on the ground of there being offices which, in the view of the Courts, were suitable to women. I do not say that this may not be an office suitable to women; what I say is it has never been, in the view of the Courts, suitable to women, and in all the discussions in those cases, in all the quotations with respect to hereditary offices that a woman may hold or her husband may hold in her right, there has never been a suggestion that the office of attorney was one which was open to a woman. The cases as to parochial offices may stand on their own merits; they have really no bearing on this case. A difficulty—I only mention it incidentally—at once arises if a woman is to be admitted an attorney or a solicitor, because it is clear that married women, not having an absolute liberty to enter into binding contracts, binding themselves personally, would be unfitted either for entering into articles or for contracting with their clients. Well, it is true that that difficulty does not apply to single women, but every woman can be married at some time in her life, and it would be a serious inconvenience if, in the middle of her articles, or in the middle of conducting a piece of litigation, a woman was suddenly to be disqualified from contracting by reason of her marriage. I only mention that incidentally; but, having regard to all that I have said, I approach the construction of the statute of the Solicitors Act, 1843, as judges have always been directed to approach such statutes, to construe them with the previous legislation and construe them with the common law. Construing that statute, and the following statutes, with the common law, I come to the conclusion that there is not enough in the statutes to shew that the Legislature intended, by their provisions, to open this profession to women. Therefore I agree that this appeal should be dismissed.

Solicitors: *Withers, Bensons, Birkett & Davies*; *S. P. B. Bucknill.*

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Nov. 3, 4, 28.

In re WOKING URBAN DISTRICT COUNCIL (BASINGSTOKE CANAL) ACT, 1911.

[1912 W. 3222.]

Corporation—Successors and Assigns—Undertaking—Assignment—Dissolution—Reversion to Grantors—Liability to perform Statutory Obligations—Marginal Notes to Act of Parliament.

In 1777 an Act of Parliament was passed for making a canal. It incorporated a company by name of the Company of Proprietors of the Basingstoke Canal Navigation, authorized them to construct the canal, to make by-laws, demand tolls, and acquire land. All persons were to have the right to use the canal on payment of tolls. The company were to make and maintain bridges. Throughout the Act in conferring rights or imposing obligations on the company the words "their successors and assigns" were added.

The canal was made and navigation carried on till 1866, when a winding-up order was made. In 1874 the liquidator with the sanction of the judge sold the canal to S. A. The word "undertaking" was not used in the conveyance, but possession was taken, and tolls levied and received. In 1878 the company was dissolved by an order of the Court. S. A. sold various portions of the land, and the last purchaser of the canal and undertaking was the L. and S. W. Canal, Limited, which executed a mortgage thereof to W. Carter.

The canal bridges fell into disrepair, and the Woking Urban District Council obtained an Act of Parliament in 1911 which authorized them to do the repairs and recover the costs from "the company":—

Held (reversing the decision of Sargant J.), that the company had no power to assign their undertaking; nothing passed to S. A. by the conveyance of 1874; on the dissolution the land of the company reverted to the original grantors, and as they made no claim to it their right of entry had been barred by the Statute of Limitations; S. A. had thus acquired the legal fee simple in the canal free from any of the obligations or rights of the company; the L. and S. W. Canal, Limited, were owners of the canal, but were not bound to keep it up or do repairs, and could not demand tolls; the Act of 1911 did not impose any fresh liability; and no liability attached upon either the L. and S. W. Canal, Limited, or Carter.

Semble per Phillimore L.J.: In some private Acts of Parliament the marginal notes may form part of the Act.

Appeal from a decision of Sargant J.

The following statement of facts is taken substantially from the judgment of Swinfen Eady L.J.: By an Act passed in 1777, 18 Geo. 3, c. lxxv., certain persons were incorporated by the name of "The Company of Proprietors of the Basingstoke Canal Navigation," with power "to purchase lands to them their successors and assigns" . . . . "And the said Company of Proprietors their successors and assigns" were thereby authorized to make and complete a canal from Basingstoke to Chertsey; and to supply the canal with water from all rivers, brooks, streams, watercourses and springs found within 1200 yards from any part of the canal; and to build bridges, locks, weirs, and reservoirs, and from time to time to alter, repair, and amend the same. The company had power to purchase land compulsorily for the purpose of the canal. The capital of the company was fixed at 86,000*l.*, with power to increase it by a further 40,000*l.* The company had power to make by-laws, for the orderly using of the navigation, tunnels, and locks, and the well governing of the bargemen, and to impose and inflict reasonable fines or forfeitures upon persons breaking the by-laws. Certain maximum rates and tolls were fixed, with power to sue for the same, or to seize any boat, barge, vessel, or goods for non-payment; and, unless the distress be redeemed within five days, to dispose of the same as the law directs in cases of distress for rent. The canal, and the roads and ways to and from it, were to be open and free to all persons, on paying the proper rates or duties. The company were also at their own proper costs and charges to make, erect, and set up, and from time to time maintain and support, such gates, stiles, bridges, arches, and passages over, under, or through the canal, and of such dimensions as should be judged necessary. "And all such gates, stiles, bridges, arches and passages so to be made, shall from time to time be supported, maintained and kept in sufficient repair by and at the expense of the said Company of Proprietors their successors and assigns." Throughout this Act the words "their successors and assigns" were added after the words "the said Company of Proprietors" or "the said company."

By another Act of Parliament, 33 Geo. 3, c. xvi., the company were empowered to borrow money upon the credit of the undertaking and the rates and duties made payable by the said Act; and by writing under their common seal to mortgage and assign over the said undertaking and the said rates or duties to the persons lending such money; and, by s. 3 of the Act, all persons to whom any mortgages should be made were to be creditors on the said rates or duties in equal degree, one with another.

The canal was duly made and opened for traffic, but fell into financial difficulties; and on June 23, 1866, an order was made under Part VIII., s. 199, of the Companies Act, 1862, to wind up the company as an unregistered company. Mr. Frederick Whinney was appointed official liquidator: *In re Proprietors of the Basingstoke Canal.* (1)

By a conveyance dated July 7, 1874, and made with the sanction of the Court, between the company by its official liquidator and William St. Aubyn, of New Wandsworth, the company purported to convey and assure unto Mr. St. Aubyn the Basingstoke Canal, with the works and buildings belonging thereto, by the following description: "All that canal known as the Basingstoke Canal with the wharves locks lockhouses embankments towing-paths bridges sluices plantations timber trees and underwood lands and property thereto belonging situate in the several parishes" mentioned, believed to be correctly described on an ordnance map signed by the parties, marked A and coloured blue, pink, and green, excepting certain surplus lands of about eighty-two acres described in the Second Schedule, "together with the full benefit of all rents covenants and services and other the benefits and advantages reserved by or contained in the leases or agreements affecting the said canal lands property and premises," and together with all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, water, water-courses, mines, minerals, liberties, privileges, easements and appurtenances to the said canal lands and premises appertaining. The conveyance did not purport to convey the undertaking or the tolls, rates, or duties, or any of the statutory rights or privileges of the company. In the year 1878 the company was dissolved, pursuant to an order of the High Court of Justice.

After the sale to Mr. St. Aubyn a series of companies obtained conveyances to them of the canal; which, in turn, went into liquidation, and either by a liquidator or by debenture trustees,

(1) (1866) 14 W. R. 956.

or both, conveyed the canal to another company, which in turn passed into liquidation. In the year 1894 the name of the company claiming to own the canal was the London and Hampshire Canal and Water Company, Limited; and in 1895 the debenture trustees of that company conveyed it away. On August 17, 1894, an Act was passed confirming a provisional order of the Board of Trade, which fixed the maximum tolls and charges to be made in respect of certain canals. The schedule to this order contained certain "special sections applicable only to the Basingstoke Canal Navigation." It contained two definitions: "the company" or "the proprietors" meant the proprietors of the Basingstoke Canal Navigation. The term "the canal" meant the Basingstoke Canal Navigation made under the Act of 18 Geo. 3, c. lxxv., for the use of which the proprietors were, at the date of the Act confirming this order coming into operation, entitled to charge tolls. The provisional order seems to have been made by the Board of Trade under the belief that the old Company of Proprietors of the Basingstoke Canal Navigation was still in existence; in any case it merely fixed the maximum amount of tolls and charges to be taken by persons who it was believed were then entitled to charge tolls: it did not purport to empower any persons to take tolls who were not then entitled to do so; and, finally, the company then claiming to own the canal had long since passed out of existence. Ultimately the canal was sold, and on March 19, 1908, conveyed to the London and South Western Canal, Limited. This company executed a mortgage to Mr. Carter, and was now in liquidation.

In 1911 an Act was passed called the Woking Urban District Council (Basingstoke Canal) Act, 1911 (1 & 2 Geo. 5, c. cvii.). The Act recited that the bridges named in the schedule were within the district of the Woking Urban District Council; and that the council were willing to undertake their reconstruction, repair, and subsequent maintenance; and that it was expedient that the Surrey County Council should be authorized to contribute part of the cost; and that the county council and the urban district council should be empowered to borrow money for the purposes of the Act. It then empowered the urban district council to execute the works, and both the county

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council and the urban district council to borrow money for the works, as regards the former, not exceeding any contribution they had agreed to make. By s. 4 the urban district council were empowered to recover the expenses of executing the works from "the company" to the extent of the obligations of the company under the Act of 1777. By s. 6 the expenses of works of repair executed before the Act were to stand charged upon "the canal undertaking" as if they were expenses of repair under the Act. By s. 10 the canal undertaking and all moneys coming into the hands of the company, or any person in occupation or possession thereof (that is to say, of the undertaking), were to stand charged with the expenses of the urban district council "and any sum agreed or determined by arbitration as provided in those sections of this Act the marginal notes whereof are 'Repair and maintenance of canal bridges by council' and 'Alteration widening or reconstruction of canal bridges by council' respectively," and the council were to have powers of recovering the same as if they were mortgagees having power of sale and lease, and of appointing a receiver, in priority to any other mortgagee or person having any charge of any nature whatsoever upon the canal undertaking, properties, or moneys aforesaid. And by s. 35 a proportion of the costs, charges, and expenses of obtaining the Act were to stand charged upon the canal undertaking as if the same had been incurred by the council in respect of repair and maintenance of canal bridges by the council under the Act.

Upon an originating summons taken out by the liquidator of the London and South Western Canal, Limited (in liquidation), and William Carter, it was declared by Sargant J. that according to the true construction of the Act of 1911 the London and South Western Canal, Limited, was liable for such part of the costs incurred by the urban district council as should be determined by arbitration, pursuant to the said Act; and that so much of the property comprised in the indenture of mortgage to Carter as was situate within the district of the Woking Urban District Council was subject to the charge created by the Act for the costs so to be determined by arbitration as aforesaid.

Although in form the order related to costs only, yet, under s. 35 of the Act, costs until repaid to the council by the company were to stand charged upon the canal undertaking, as if the same had been incurred by the council in respect of repair and maintenance of canal bridges by the council under the Act. This liability for repair and maintenance was of a very serious character, and the effect of the order was to hold the London and South Western Canal, Limited, liable, and that liability was a first charge on part of the property in mortgage to Carter; but Carter was not fixed with any personal liability.

The liquidator of the London and South Western Canal, Limited, and Carter appealed.

Martelli, K.C., and *A. L. Carter*, for the appellants. The London and South Western Canal, Limited, does not represent the original company and is not liable for the costs of obtaining the Act of Parliament of 1911 nor for the repairs of the bridges; and no such liability ought to be charged on their land. The undertaking of the original company was not transferred to the appellants' predecessors in title, and in fact the company had no power to delegate or transfer their powers and duties to anybody: *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) The words in the special Act of 1777 "successors and assigns" are mere surplusage; they have no operation which can put any liability on the appellants. The Act of 1911 did not create any fresh liability, and it is not to the point to ask who else can be liable? We submit that nobody is liable to repay to the plaintiffs the costs of these repairs. The Act of 1911 purposely omitted to state from whom the costs were to be recovered. In 1866 the company was wound up: *In re Proprietors of the Basingstoke Canal.* (2) In 1878 the company was dissolved and its powers and obligations came to an end. The Acts of 1894 and 1911 omit all mention of the dissolution and treat the company as still in existence, but they do not create a fresh company or revive the powers of the original company. The Act of 1911 does not mention the appellants. They are not in any sense the "successors or assigns" of the company: *Potts* v. *Warwick and*

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(1) (1867) L. R. 2 Ch. 201, 212.

(2) 14 W. R. 956.

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Birmingham Canal Navigation Co. (1) Even if they are not entitled to obstruct public rights of navigation they are not subject to any of the obligations imposed by the Act of 1777. The true solution of this difficult position is that on the dissolution the lands acquired by the company reverted to the original grantors: *Hastings Corporation* v. *Letton* (2); the latter did not assert any claim, and the appellants' title is one by adverse possession under the Statute of Limitations. The result is that the company and all its powers and obligations have ceased to exist and the appellants are entitled to the property in fee simple. That no one is now liable for repairs is the fault of the persons who procured the Act of 1911 without providing for that liability.

Romer, K.C., and *A. Underhill*, for the Woking Urban District Council. The Act of 1911 provides by s. 35 that these costs and repairs are to be recovered from the company, and the appellants are the only persons who answer that description. They are successors and assigns of the original company under the sale by order of the Court: *In re Bradford Navigation Co.* (3) By order of the Court the whole canal was conveyed to St. Aubyn, from whom the appellants derive their title. He took it subject to the rights of the public. In several of the subsequent conveyances the undertaking is included in the parcels. All the persons who thus acquired this land were successors and assigns of the company within the Act of 1777, which gave power to assign. No doubt the words "successors and assigns" are useless as words of limitation, but the Act was intended to apply to somebody, and the appellants got a good title through St. Aubyn and are the persons who, by keeping open the canal, have made it necessary to have bridges. Carter may not be such an assign as is contemplated by the Act, and we prefer a charge on the land to his personal liability. We could not give notice to the original company, for it had been dissolved. The charge should be on the undertaking as well as on the land. The Court had jurisdiction to make a winding-up order and authorize the liquidator to sell the undertaking: *In re Barton-upon-Humber*

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(1) (1853) Kay, 142.

(2) [1908] 1 K. B. 378.

(3) (1870) L. R. 10 Eq. 331; L. R. 5 Ch. 600.

and District Water Co. (1); *In re Bradford Navigation Co.* (2); but the rights of the public continued to exist: *In re Bradford Navigation Co.* (3); *Marshall* v. *South Staffordshire Tramways Co.* (4) Derelict canals are now, by s. 45 of the Railway and Canal Traffic Act, 1888, under the jurisdiction of the Board of Trade, and these questions will not arise. We can enforce a charge under that section. The appellants have no right to appeal on the ground that their title is so bad that they cannot claim to be successors or assigns of the old company.

Martelli, K.C., in reply.

Cur. adv. vult.

Nov. 28. Cozens-Hardy M.R. The circumstances of this case are peculiar; and the questions of law which arise for our decision are difficult. [His Lordship stated the effect of the Act of 1777.] Throughout the Act of 1777, in conferring rights or imposing obligations upon the company, the words "successors or assigns" are added. Such words are meaningless as words of limitation in a conveyance to a corporation aggregate; and in the case of a statutory company formed for the purpose of carrying on a public undertaking, I think it is clear that the company could not assign the undertaking, with its rights and obligations. The well-known judgment of Cairns L.J. in *Gardner* v. *London, Chatham and Dover Ry. Co.* (5) applies; for there is, for this purpose, no distinction between a canal company and a railway company. I think the words "their successors and assigns" are meaningless, and must be disregarded.

The canal was made; and the business of the navigation was carried on, with more or less success, for eighty or ninety years. But in 1866 a winding-up order was made, under s. 199 of the Companies Act, 1862. The authorities decide that there was jurisdiction to make such an order. The liquidator, with the sanction of the judge, sold the canal to Mr. St. Aubyn in 1874. The parcels of the conveyance are, so far as material, "All that canal known as the Basingstoke Canal with the wharves locks lockhouses embankments towing-paths bridges sluices plantations timber trees and underwood lands and property thereto belonging situate in the several parishes of Basingstoke, ... Woking, Horshill and Chertsey," (being in fact the whole length of the canal) save and except the surplus lands comprising eighty-two acres described in the Second Schedule. Then follow very wide general words. It will be observed that the word "undertaking" is not used; but the whole navigable canal from Basingstoke to Chertsey, with all locks, towing-paths, and wharves, was included in the conveyance; and possession was taken thereunder, and tolls were levied and received. The precise operation and effect of this conveyance must be considered. The statutory undertaking still remained in the company. Even if, contrary to my opinion, the conveyance passed the canal to the purchaser, the rights of the public to use the canal could not be destroyed by the conveyance. The purchaser could not build over or destroy the canal, or legally levy any tolls. On the other hand, he was not liable to the obligations to repair bridges, &c. There are some observations by James L.J. in *In re Bradford Navigation Co.* (1) which suggest that the purchaser might take the land subject to the rights of the public. *In re Bradford Navigation Co.* (1) was this. It was an appeal against an order to wind up the canal called the Bradford Navigation Company, and the owner of a canal communicating with that wanted to appear on the appeal, and it was held that he had no locus standi; but in deciding that point James L.J. says this (2): "I am of opinion that the winding-up order does not in the slightest degree derogate from any right whatever which any member of the public has with respect to this canal. The winding-up will deal with such rights as the partners in the partnership can deal with themselves. The Court will deal with it just as the partners themselves could have dealt with it. They cannot sell it so as to interfere with the rights of the public. If they have been already guilty of any wrong, if they have turned out the water from the canal when they ought not to have done it, they are still liable to an indictment for doing that; and they may be liable to an injunction, or to any proceedings which may be taken against

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(1) (1889) 42 Ch. D. 585, 587.

(2) L. R. 10 Eq. 331, 341.

(3) L. R. 5 Ch. 600, 602.

(4) [1895] 2 Ch. 36, 53.

(5) L. R. 2 Ch. 201, 212.

(1) L. R. 5 Ch. 600. (2) L. R. 5 Ch. 602.

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them—just in the same way as if any person had a right of road over a field which was part of partnership assets, a suit for the administration of the partnership assets would not deprive that person of his right of road. If this canal had been a private speculation—like the Duke of Bridgewater's canal, for instance—instead of being the canal of an incorporated company, these people might as well have said, 'Do not give the Duke of Bridgewater or his representative a decree for the administration of his estate without allowing us to be heard as to what is to be done with the canal which is part of his estate.' It appears to me that it would be extending litigation beyond all possible limits if every person who may have a right with respect to property which belongs to a company could come here and say that the winding-up will interfere with his rights. The Court would take care of all those rights in the proper mode if the company were attempting to sell, but, in fact, they would probably be unable to sell without the assistance of an Act of Parliament, because nobody could use the land as a canal unless under the authority of an Act, and it might be difficult to sell it for any other purpose. Possibly the result of the winding-up may be to authorize the company to go to Parliament for the purpose of obtaining an Act to enable them to sell and get rid of the public rights." I cannot regard those observations as justifying the inference which it is sought to draw from them. There is also a dictum by Lindley L.J. in *Marshall* v. *South Staffordshire Tramways Co.* (1) to the same effect. But I am unable to assent to this view. I think nothing passed by the conveyance, for it purported to pass that without which this statutory undertaking could not be carried on, and was, therefore, ultra vires the company. In saying this, I do not refer to any surplus lands, or to property which might be parted with without damage to the undertaking. The proper course for the liquidator to have taken was to have applied for a private Act of Parliament authorizing the transfer of the undertaking to the purchaser. This course has actually been followed in several cases. In my opinion the purchaser acquired only a possessory title which might ripen into a fee simple by virtue of the Statute of Limitations.

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(1) [1895] 2 Ch. 36, 53.

The next thing to be mentioned is that in 1878, by an order of the Court, the company was dissolved under ss. 142 and 143. No such order ought to have been made; but it was made. The effect of the dissolution of a corporation is stated in Co. Litt. 13b: "And so if land be given in fee simple to a Deane and Chapter, or to a maior and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have again the land, and not the lord by escheate. And the reason and the cause of this diversity is, for that in the case of a body politique or incorporate the fee simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth." See also Blackstone, vol. i. pp. 484—485: "The body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is indeed only during the life of the corporation; which *may* endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life." The point was not long ago raised in *Hastings Corporation* v. *Letton* (1), where the dissolution also took place under ss. 142 and 143, and the old authorities were applied. Assuming that the law is as stated, a right of entry arose in 1878, in favour of persons claiming through or under the persons who conveyed to the company shortly after 1777. This right of entry has, of course, been barred by the Statute of Limitations. The result appears to be that St. Aubyn, and persons claiming through or under him, have acquired the legal fee simple in the canal, including the locks and wharves, free from any of the obligations

(1) [1908] 1 K. B. 378.

imposed upon the original company, and without any of the rights conferred upon the company.

There have been several conveyances since 1874 to persons deriving title through St. Aubyn. The last purchaser was the London and South Western Canal, Limited, which executed a mortgage in favour of William Carter. The company is in liquidation; and Carter is mortgagee in possession. What was and is the position of the limited company? In my opinion it is this, and only this. They are owners of the waterway—the canal—and are not bound to effect any repairs or to keep up the canal: any payment of an agreed sum is not a toll, and cannot be claimed as such. I should add that the fact of the dissolution of the company is not mentioned in any of the deeds, or in either of the Acts of Parliament to which I am about to refer. In 1894 an Act was passed confirming a provisional order for (inter alia) "the Basingstoke Canal Navigation." The term "the canal" means the Basingstoke Canal Navigation made under the Act of 1777, for the use of which the proprietors were, at the date of the Act confirming the order coming into operation, entitled to charge tolls. In my opinion there were no such persons. I can see no ground for holding that the 1894 Act by implication created a new corporation. Even if this were so, it would not avail the present limited company, whose title was only acquired in 1908; and, from what I have said before, they could not obtain by purchase the undertaking which, ex hypothesi, was vested by statute in some corporation, the name of which is not defined. Meanwhile the canal bridges fell into disrepair; and the Woking Urban District Council deemed it necessary, for the safety of the common highways, that the bridges should be rebuilt or repaired; and they promoted a Bill which ultimately became the Woking Urban District Council (Basingstoke Canal) Act, 1911. This Act nowhere names the present limited company, but calls the Company of Proprietors of 1777 "their successors and assigns" collectively the company. It authorizes the council, in default of "the company," to properly support, maintain, and repair the bridges, and to recover the proper amount from "the company"; and it charges upon the canal undertaking the amount so payable by "the company." And by s. 35 the taxed costs of the Act are in the first instance to be paid by the council; and a proper proportion, to be ascertained by arbitration, is to be repaid by "the company"; and until repaid such costs are to stand charged upon the canal undertaking as if the same had been incurred by the council in respect of repair and maintenance of canal bridges by the council under the Act.

A summons was taken out to ascertain the true construction of the Act; and Sargant J. has declared that the limited company were liable to pay certain costs, and that the property within the council's district comprised in the mortgage to Carter was subject to a charge for the amount. The amount in question is not large; but, as the decision involves the liability to repair and keep in repair the bridges, the matter becomes of serious importance.

I am unable to accept Sargant J.'s view. The Act of 1911 did not impose any fresh liability. It authorized the council to advance the money, and to do the work; and left them to recover a proper proportion from any person liable, whether ratione tenuræ or otherwise, to pay. It was obviously a matter of doubt and difficulty. But if neither the limited company nor Carter properly falls under the head of "the company their successors or assigns," or can claim to own "the undertaking," it seems to me that no liability can attach upon either of them or upon the property.

The appeal must be allowed.

SWINFEN EADY L.J., after stating the effect of the Act of 1777 as set out above, continued: The words "successors and assigns" after the words "the said Company of Proprietors" in the Act of 1777 have not any more meaning in the case of a statutory company formed to carry out a public undertaking than they have as words of limitation in a conveyance to a corporation aggregate. They are mere surplusage and meaningless. See Co. Litt. 94b. [His Lordship referred to the Act 33 Geo. 3, c. xvi., the winding-up proceedings, the conveyance to St. Aubyn, and the dissolution of the company, and proceeded:] It is necessary to pause here in order to consider what the legal position of the parties then was. Where a company is incorporated by statute for a public purpose, with compulsory powers of acquiring land and other statutory privileges, and with statutory obligations, it cannot, without the intervention and authority of Parliament, transfer its undertaking, or its powers or privileges, to other persons. Neither can it mortgage its undertaking, except in the manner and to the extent permitted by Parliament. It has generally been with reference to railway companies that questions of this nature have arisen; but the rule is not limited to these companies; it extends also to water companies, canal companies, and the like: *Great Northern Ry. Co.* v. *Eastern Counties Ry. Co.* (1); *Beman* v. *Rufford* (2); *London, Brighton and South Coast Ry. Co.* v. *London and South Western Ry. Co.* (3); *Gardner* v. *London, Chatham and Dover Ry. Co.* (4); *Richmond Waterworks Co.* v. *Vestry of Richmond.* (5) In *Attorney-General* v. *Great Eastern Ry. Co.* (6) Lord Blackburn said: "I quite agree that a company" (referring to a railway company) "cannot make a lease without the authority of Parliament. That has been expressly decided, and I quite agree that where an agreement under the shape and colour of a working agreement really amounts to a lease, so as to be a delegation of the whole concern and all its powers, that is as operative as a lease itself"; and in the same case Lord Watson said (7): "That principle,"—that is to say, the principle upon which the case of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (8) was decided —"in its application to the present case, appears to me to be this, that when a railway company has been created for public purposes, the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication." See also *Baroness Wenlock* v. *River Dee Co.* (9)

It appears from the case of *Pontet* v. *Basingstoke Canal Co.* (10) that the Company of Proprietors of the Basingstoke Canal Company did borrow money, upon the security of their undertaking, as authorized by the Act already referred to; and the Court of Common Pleas decided that, having regard to the nature of the security, an action of covenant for payment of interest did not lie against the company; but Tindal C.J. did say (1) the remedy of the lenders "would be by entering on the property of the company." This dictum was, however, corrected in *Doe* v. *St. Helens Ry. Co.* (2), where upon a similar form of security it was held that the mortgagee did not acquire title to the land, and could not bring ejectment in respect of it; such a mortgage does not pass the soil of the railway; and Lord Denman said (3), with reference to the words of Tindal C.J. in *Pontet* v. *Basingstoke Canal Co.* (4): "The decision in that case was only that covenant did not lie: and I think that, if the Lord Chief Justice had given further consideration to the statute, he would have seen that an ejectment, at all events, was not the other alternative." Again it has been decided that a holder of such mortgage debentures "of the undertaking" is not entitled to foreclosure or sale: *Furness* v. *Caterham Ry. Co.* (5); although if the property be sold and conveyed under the authority of an Act of Parliament, the debenture-holders are entitled to be paid out of the proceeds of sale: *Furness* v. *Caterham Ry. Co.* (6) Again, in the case of such a statutory company as before mentioned, the liquidator in a winding-up cannot, in my opinion, sell and convey the land necessary for carrying on the company's undertaking. This consequence follows, from the authorities to which I have already referred, notwithstanding the dictum to the contrary in *Marshall* v. *South Staffordshire Tramways Co.* (7) A tramway is an exception to the general rule, and is governed by the provisions of the Tramways Act, 1870: see *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh.* (8) In *In re Bradford Navigation Co.* (9) James L.J. said (10) that the canal company would probably be unable to sell without the assistance of an Act of Parliament, because nobody would use the land as a canal, unless under the authority of an Act; and it might be difficult to sell it for any other purpose—that possibly the result of the winding-up might be to authorize the company to go to Parliament for the purpose of obtaining an Act to enable them to sell and get rid of the public rights. He had previously said that the winding-up order did not in the slightest degree derogate from any right whatever which any member of the public had with respect to the canal. See also *In re Barton-upon-Humber and District Water Co.* (1)

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(1) (1851) 9 Hare, 306.
(2) (1851) 1 Sim. (N.S.) 550.
(3) (1859) 4 De G. & J. 362.
(4) L. R. 2 Ch. 201.
(5) (1876) 3 Ch. D. 82.
(6) (1880) 5 App. Cas. 473, 484.
(7) 5 App. Cas. 486.
(8) (1875) L. R. 7 H. L. 653.
(9) (1885) 10 App. Cas. 354.
(10) (1837) 3 Bing. N. C. 433.

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(1) 3 Bing. N. C. 438.
(2) (1841) 2 Q. B. 364.
(3) Ibid. 373.
(4) 3 Bing. N. C. 433.
(5) (1858) 25 Beav. 614.
(6) (1859) 27 Beav. 358.
(7) [1895] 2 Ch. 36, 53.
(8) [1894] A. C. 456.
(9) L. R. 5 Ch. 600.
(10) Ibid. 603.

If, however, the company's land, including the site of the canal, was duly sold and conveyed to Mr. St. Aubyn, it is clear that neither the "undertaking" nor the statutory powers and privileges passed to the purchaser.

Whether Mr. St. Aubyn acquired a good title, or not, by the conveyance is now probably immaterial, having regard to the lapse of time. The company was dissolved by an order of the Court, under ss. 142 and 143 of the Companies Act, 1862. The lands acquired by the corporation, if not duly conveyed by the liquidator, reverted to the grantors: Co. Litt. 13b; Blackstone's Commentaries, vol. i. pp. 484—485; *Hastings Corporation* v. *Letton.* (2) Any right of entry by the grantors or persons claiming through them is probably long since barred by the Statute of Limitations. In any case, upon the dissolution of the company, there ceased to be any body or person in whom any undertaking, or the right to any tolls or duties, rights or privileges, was vested; or any person liable in respect of the obligations imposed on the company by the Act of 1777. [His Lordship stated the intermediate conveyances, the Act of 1894, and the mortgage to Carter as set out above.] This was the position when the Act of 1911, under which the liability of the appellants is said to arise, was passed. The burden of the obligations imposed by the Act of 1777 upon the company thereby incorporated does not run with the land; and immediately before the passing of the Act of 1911 neither the London and South Western Canal, Limited, nor Carter were bound thereby: *Keppell* v. *Bailey* (3); *Austerberry* v. *Oldham Corporation.* (4) Then

(1) 42 Ch. D. 585.

(2) [1908] 1 K. B. 378.

(3) (1834) 2 My. & K. 517.

(4) (1885) 29 Ch. D. 750.

does the Act of 1911 create or impose upon the appellants or either of them any liability? In terms it does not purport to do so. [His Lordship stated the effect of the Act of 1911.] In my opinion the Act did not impose any new liability upon the London and South Western Canal, Limited, nor upon Carter, nor upon the property. It empowered the urban district council to execute certain necessary works, and to raise and obtain the money for that purpose; and, if there were any company legally liable for the work, the urban district council could recover the amount from the company so liable, to the extent of the obligations of the same company. But neither the London and South Western Canal, Limited, nor Carter are "the company their successors or assigns" upon whom the obligations were imposed by the Act of 1777, nor do they own "the undertaking" established by that Act.

The position is that the Woking Urban District Council have obtained the requisite powers and means for executing much needed works. Whether any person was liable for executing these works was plainly a matter of much difficulty; if it had not been so, proceedings would have been taken against the persons liable, to compel them to fulfil their obligations. In the present proceedings, the difficulties in the way of establishing liability upon any one have become apparent; and the Woking Urban District Council have established that they were justified in seeking powers from Parliament to do what no one else was liable to do. But these proceedings have also established that there is not any one from whom the Woking Urban District Council can claim payment of any portion of the expenses incurred by them.

In my opinion the appeal should be allowed.

Phillimore L.J. This is an appeal from an order made by Sargant J., whereby he declared that according to the true construction of the Woking Urban District Council (Basingstoke Canal) Act, 1911, the London and South Western Canal, Limited, is liable for such part of the costs incurred by the urban district council in obtaining the Act as shall be determined by arbitration; and that so much of the property mortgaged by the

London and South Western Canal, Limited, to William Carter as is situated within the district of the Woking Urban District Council is subject to the charge created by the Act for the costs so to be determined. [His Lordship stated the Acts of 1911 and 1777, and continued:] Stress has been laid by the respondents upon the words "successors or assigns." In my view those words have no substantial effect. It is admitted that it has long been the usual conveyancing language to add the words "successors and assigns" in a grant of land to a corporation in imitation of the words "heirs and assigns" in a grant to a person; and that at any rate when applied to a corporation aggregate these words have no conveyancing value. It was suggested that it might be otherwise where powers are given; but in my view this is not so. The words once used at the beginning of the Act of 1777 became a common cantilena which was adopted throughout the Act. It is well established law that powers given to a corporation by charter cannot be delegated or transmitted by the corporation; and, though Parliament might otherwise provide, I find no machinery in the Act by which these powers could be devolved. No provision is made for the dissolution of the corporation, or for the creation of another authority. The only effect which can be given to these words "successors and assigns" is to construe them as meaning successors and assigns according to law; that is, that if Parliament thereafter created a substituted corporation for working the canal, the powers given by the first Act should pass to the substituted corporation without express provision to that effect; and similarly if Parliament assigned the undertaking to a person or to another corporation.

The canal fell, as many other canals have fallen, on evil days; and in 1866 an order was made to wind it up. Such an order could, according to the decisions, be made under the provisions of s. 199 of the Companies Act, 1862; and similar orders have been made in other cases. Under such an order there would be an official liquidator who would have power to use the rents and profits to pay debts, and who might sell any real or personal property not required for the purpose of the undertaking. He had, however in my opinion, no power to proceed further and sell the canal with its locks and tow-paths, or any other property real or personal required for the use of the undertaking. James L.J., it is true, in *In re Bradford Navigation Co.* (1), seems to have thought that a liquidator could so sell; but it was an obiter dictum, and he said that the liquidator could not, by selling, free the lands from their liability to discharge the public uses and burdens of the undertaking; and he intimated that in all probability recourse would have to be had to an Act of Parliament—a recourse which was, in fact, had in the case of the Wey and Arun Canal Company. Unless and until the property of a corporation or company in course of liquidation is sold, the corporation or company ought not to be finally wound up and dissolved. In fact, however, the liquidator purported to sell the land, not the undertaking, to one St. Aubyn in 1874; and the company was dissolved by order of the Court in 1878.

The position between 1874 and 1878, when there was a corporation still in existence, having the rights and duties conferred upon it by the Act, but apparently deprived of the land in respect of which it had its rights and duties, is evidently one which never should have been brought about. Be this as it may, St. Aubyn acquired the land in this way, and sold it to one Smith in 1880. Smith was a trustee for the Surrey and Hants Canal Company, Limited, who acquired the land from Smith that same year. That company in 1884 purported to sell to the London and Hampshire Canal Company; which I think in 1895 purported to sell to one Hunt; who shortly afterwards sold to a Woking company; whence finally a title of the same kind is derived to the appellants, the London and South Western Canal, Limited, and from them to their mortgagee Carter. I have said that each of these canal companies sold; but in some cases —in which it is not material to particularize—trustees for debenture-holders took possession of the canal, with its adjacent lands, and sold to the next company or its trustees. It is probable that each of these unfortunate companies in its turn acted as if it was a successor in law of the original company, and had the same rights, and that each issued notices, claimed tolls, and very likely purported to enforce the old by-laws. Some of the later conveyances purport to pass the undertaking. But in my view this was all a mistake. None of them were successors or assigns of the undertaking for which the original company was incorporated.

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(1) L. R. 5 Ch. 603.

The confusion, however, was so great that in 1894 some person or body induced the Board of Trade to treat this canal as a going concern, and some body controlling it as having power to levy tolls, and being bound to admit the public on payment of the proper tolls, and to make a provisional order under the Railway and Canal Traffic Act, 1888, which was confirmed with a number of similar orders by the local and personal Act 57 & 58 Vict. c. cc. In that Act the general provision relating to all the navigations dealt with is as follows: "From and after the commencement of this Order the maximum tolls and charges which the proprietors of the canals and navigations named in the schedule to this Order annexed shall be entitled to charge and make in respect of merchandise traffic on those canals shall be the tolls and charges specified in the said schedule, and shall be subject to the classification, regulations, and provisions set forth in the said schedule." There are also special provisions applicable to each navigation; and with regard to this navigation the following provisions may be noted: "In this schedule, unless the context otherwise requires, the term 'the company' or 'the proprietors' means the proprietors of the Basingstoke Canal Navigation; The term 'the canal' means the Basingstoke Canal Navigation, made under the Act 18 George III., chapter lxxv., for the use of which the proprietors were at the date of the Act confirming this Order coming into operation entitled to charge tolls."

At the moment when that Act passed, the person in de facto possession of the canal was a receiver for debenture-holders appointed by order of the Chancery Division. As far as can be ascertained, he did not apply for the order, and from several circumstances in the case, it seems to me probable that it was another Government Department—the War Office—who, using the canal to bring certain heavy goods to Aldershot, set the Board of Trade in motion. Whether this Act gave a new existence to the undertaking, and put the receiver or the trustees for the debenture-holders or the then insolvent company into the position of the original Company of Proprietors of the Basingstoke Canal Navigation, it is again unnecessary to determine. If it were so, this would not give any rights or impose any duties upon the next person or company who purported to purchase the canal; but I think it is impossible to extract from this provisional order so large an operation as the new creation of a chartered company with the public rights and duties conferred by the original statute. I agree with the other members of the Court that upon the dissolution of the corporation the lands reverted to the original grantors, as Darling J. and I decided in *Hastings Corporation* v. *Letton* (1), but that a good title as against them has long since been acquired under the Statute of Limitations.

In 1888, by the statute of 51 & 52 Vict. c. 25, provision was made for dealing generally with unnecessary or derelict canals and a procedure was established by which the Board of Trade might get them closed, and the rights and liabilities of all persons determined, and put on a business footing. The word "derelict" should be noticed because, in the preamble of the Act of 1911 which we are construing, it is recited that "the undertaking for all practical purposes has become and now is a derelict undertaking."

This being the history, the Woking Urban District Council insists that the London and South Western Canal, Limited, and/or Carter is the company referred to in ss. 4, 5, 6, and 35 of the Act of 1911, from whom they can recover a proportion of the costs of passing this Act, and hereafter of repairing the bridges, and upon whose lands, so far as they are locally situated within the Woking urban district, they can get a charge for the costs and the expenses for these repairs. They make out their contention, first, by saying that the present company and Carter or one of them are successors or assigns of the original Company of Proprietors of the Basingstoke Canal Navigation; and, secondly, that they are at any rate the company struck at by the Act of 1911.

(1) [1908] 1 K. B. 378.

I have pointed out that the present company is not a successor or assign of the original one. If it was, Carter, in whom the legal estate is vested, would also be an assign, and be personally liable; but the respondents shrink from suggesting this; they only want to get at the land mortgaged to him. Neither can it be said with any certainty that the London and South Western Canal, Limited, is the company struck at by the Act of 1911. In remarkable language, the second clause of the preamble, after reciting the incorporation of the original company, says "and by that Act the said Company of Proprietors their successors and assigns (in this Act called collectively 'the company')." It then proceeds to speak of the doings of "the company," some of the recitals referring to the original, others referring to any one of the de facto proprietors—whether companies or individuals—since the sale in 1874; and then, in s. 3, in a passage already quoted, re-defines "the company" as meaning that in the second clause of the preamble called collectively "the company." In s. 5 it speaks of the powers conferred upon the company by the Act of 1777. That can only mean the original company. No doubt obligations are expressed to be imposed in ss. 4, 5, and 6 which can only be imposed upon a living company, but there is no recital that the original company was dissolved, and nothing to shew that it was in the mind of Parliament that the original company had been dissolved, or its place taken by any one.

The really operative part of the statute is that which enables the urban district council to take possession of these bridges sufficiently to repair them, and, if necessary, to widen them, to expend money out of its rates, and to get a contribution from the county council which it may raise by mortgage. Further power is given to the urban district council to get a contribution from any body corporate or possibly any person whom it can shew—if it can shew—to be standing in the shoes of the original company.

But the Act goes no further; and this is not far enough to impose any liability on the existing company or upon the canal lands within the district, which are not the "canal undertaking" as defined in s. 3.

I need not go any further, but if one may look at the marginal

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note to s. 11, it would seem clear that the Legislature considered that the original canal company was still in existence. I am aware of the general rule of law as to marginal notes, at any rate in public general Acts of Parliament; but that rule is founded, as will be seen on reference to the cases, upon the principle that those notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons. Where, however, as in s. 10 of this Act, and in some other recent local and personal Acts which have come under my cognizance, the marginal notes are mentioned as already existing and established, it may well be that they do form a part of the Act of Parliament. I do not, however, decide the case upon this ground.

In my opinion this appeal should be allowed.

Solicitors: *Fraser & Christian; R. Mossop.*

H. C. R.

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ASTBURY J.
Nov. 7, 18.
C. A.
Dec. 16.

In re SCHWEPPES, LIMITED.

[1913 S. 1838.]

Company—Scheme of Arrangement—Increase of Capital—Reorganization of Share Capital — Alteration of Preferential Rights — Modification of Memorandum—Consolidation of Classes of Shares—Division of Shares—Companies (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 45, 120.

The memorandum of a company provided that its capital should consist of 950,000*l.* divided into 300,000 preferred shares, 300,000 ordinary shares, and 350,000 deferred shares (all of 1*l.* each) with such respective rights as were defined by the articles. The articles gave a cumulative preferential dividend of 7 per cent. to each of the three classes of shareholders in succession and divided the surplus profits between the ordinary and deferred shareholders. The company proposed a scheme of arrangement between the company and its ordinary shareholders, under s. 120 of the Companies (Consolidation) Act, 1908, whereby the company should be authorized to issue 100,000 new ordinary 1*l.* shares to rank equally with the existing ordinary shares, and that, as a consideration, a proportion of the new shares should be issued to the existing ordinary shareholders at par. A meeting of the ordinary shareholders was held under an order of the Court, made on the company's application under s. 120, and a resolution approving the scheme was passed by a majority sufficient to satisfy s. 120 but not sufficient to satisfy s. 45 of the Act. This petition was presented by the company for the confirmation of the scheme:—

Held (reversing the decision of Astbury J.), that the proposed arrangement did not modify the conditions contained in the memorandum and would not be an interference with any preferential rights; that it was therefore not within s. 45, and might be sanctioned under s. 120.

In re Doecham Gloves [1913] 1 Ch. 226, overruled.

In re Palace Hotel [1912] 2 Ch. 438, approved.

Per Curiam: Sect. 45 is confined to two modes of reorganizing the share capital, namely, by the consolidation of shares of different classes, and by the division of shares into shares of different classes.

SCHWEPPES, LIMITED, was incorporated under the Companies Acts on May 6, 1897. Article 5 of the memorandum of association was, " The capital of the company is 950,000*l.* divided into 300,000 preference shares of 1*l.* each 300,000 ordinary shares of 1*l.* each and 350,000 deferred shares of 1*l.* each with such respective rights as are defined by the articles of association registered herewith, and upon any increase of capital the company is at liberty to issue any new shares with any preferential deferred qualified or special rights privileges or conditions attached thereto but not so as to prejudice the preferential rights hereby attached to the preference and ordinary shares in the initial capital."

The articles provided for the payment out of profits of (1.) a cumulative preferential dividend of 7 per cent. on the preference shares; (2.) a cumulative preferential dividend of 7 per cent. on the ordinary shares; (3.) a cumulative preferential dividend of 7 per cent. on the deferred shares, and subject thereto for the payment of any surplus profits, one-fourth to the ordinary shareholders and three-fourths to the deferred shareholders. They also gave the preference shares priority as to capital over all the other shares, and the ordinary shares priority as to capital over the deferred shares.

All the capital of the company had been issued and was fully paid.

The company had been very successful and had largely increased its business; but it needed further working capital. The company prepared a scheme of arrangement intended to be approved by the Court under s. 120 of the Companies (Consolidation) Act, 1908, between the company and its ordinary shareholders, whereby it was provided (1.) that the company should be at liberty to increase its capital by 100,000*l.* divided into 100,000 shares of 1*l.* each, such new shares to be ordinary shares and to be entitled to similar rights and priorities, both as to capital and dividends, to those attached to the ordinary shares in the initial capital and to rank pari passu therewith. (2.) Of the new shares so created there should be offered in the first case to each holder of ordinary shares on the register at the date of the resolution creating the new shares one new ordinary share for each complete number of five shares held by him at the price of 20*s.* a share.

By an order of the Court made on the application of the company under the Companies (Consolidation) Act, 1908, s. 120, it was ordered that a meeting of the ordinary shareholders should be held for the purpose of considering and approving the scheme of arrangement. The meeting was held on July 25, 1913, and the scheme approved by a majority sufficient to satisfy the requirements of s. 120 of the Act, but not sufficient to satisfy the requirements of s. 45 (1) thereof.

This petition was presented by the company for the Court's approval of the scheme, and was heard before Astbury J. on November 7, 1913.

H. E. Wright, for the petition.

Cur. adv. vult.

Nov. 18. ASTBURY J. (after stating the facts of the case as above). The questions I have to determine are (1.) whether this scheme modifies the conditions contained in the company's memorandum of association, and if so, (2.) whether I have power under the circumstances to sanction it under, and after compliance with the provisions of, s. 120 of the Act. As to the first point, it appears to me clear that the proposed scheme does modify the conditions of the memorandum. According to the memorandum of this company, the ordinary shares are limited to 300,000, having the preferences and privileges attached thereto by the articles registered therewith, and any increase of capital prejudicing such preferential rights is thereby forbidden. If therefore an increase of 100,000 shares were made, the new shares, unless consolidated with the existing ordinary shares, would form a different class, and be subject, as to their rights, to the preferential rights of the existing ordinary shares. If, on the other hand, they were consolidated and issued as ordinary shares as proposed, the conditions of the memorandum would in my judgment be modified so as to reorganize the share capital of the company by consolidation of shares of different classes within the meaning of s. 45 of the Act, and further such duplication or increase of shares would, as decided by Neville J. in his judgment in *In re Doecham Gloves* (1), and in an earlier case of *Mellins Food* [0018 of 1912] (2), be also an interference with the preference or special privileges of the existing ordinary shares within the meaning of the proviso of the same section. I understand that there are a number of other unreported cases similarly dealing with this subject. With regard to the second point it has been contended before me, although I do not for the above reasons agree with such contention, that no modification of the memorandum by consolidation or sub-division within the meaning of s. 45 is involved in the present proposed scheme and that no preference or privilege of the ordinary shares "as a class" would be thereby interfered with. It has also been contended that the decision in the *Doecham Case* (3) above referred to is at variance with the decision of Swinfen Eady J., as he then was, in *In re Palace Hotel* (4), and that the latter case is a sufficient authority for sanctioning the present scheme as a compromise or arrangement within s. 120. I am not clear that these two decisions are really in conflict. In the *Palace Hotel Case* (1) there was no question of consolidation of shares of different classes or of the division of shares into shares of different classes, but in a scheme of reduction of capital, shares of existing classes were divided into shares of smaller denomination and the rate per cent. of the future preferential dividend on the reduced preference shares was reduced and certain arrears of preferential dividend cancelled. The learned judge held that this scheme of reduction did not fall within s. 45, and that compliance with s. 120 was under the circumstances sufficient; and it may be that that portion of the scheme relating to the preferential dividend and the arrears was incidental to a reduction of capital and capable of being sanctioned as such. See *Balmenach-Glenlivet Distillery* v. *Croall.* (2) In any event it is clear that there was no decision in the *Palace Hotel Case* (1) that a modification of the conditions of a company's memorandum falling within s. 45 can be sanctioned by the Court in disregard of the provisions of that section, or that an arrangement such as the present proposed scheme is an arrangement within s. 120 and not a modification of the memorandum of association within s. 45.

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(1) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 45:

"(1.) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes:

"Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class."

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(1) [1913] 1 Ch. 226, 231.

(2) Neville J., March 5, 1912, Unreported.

(3) [1913] 1 Ch. 226.

(4) [1912] 2 Ch. 438.

On the other hand, the decision of Neville J. in *In re Doecham Gloves* (3), with which I respectfully agree, is directly in point in the present case on both the questions above mentioned, and I hold therefore on the second point that compliance with the provisions of s. 120 alone is insufficient to enable me to sanction the present proposed scheme.

The head-note in the *Doecham Case* (3), in so far as it suggests or implies that a modification of a memorandum, which does not involve a consolidation or sub-division of the character referred to in s. 45, may be sanctioned thereunder, is not, I think, in accordance with the decision of Neville J. in that case. See also the decision of the same learned judge in *In re Australian Estates and Mortgage Co.* (4)

I understand that my decision may be taken for review to a higher Court, and, having regard to the frequency with which similar cases arise to be dealt with, I hope this will be done, and I propose to state certain further reasons in support of the conclusion to which I come. (1.) Under s. 7 of the Act "A company may not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act." (2.) With regard to the "cases," "mode," and "extent" above referred to, these are, I think, to be found in s. 9 as to objects, and ss. 41 to 56 inclusive as to share capital, where careful provision is made either for notice to be given to the Registrar of Companies of the modification or alteration in question in addition to that involved in s. 26, or for delivery to or filing with him an office copy of the order confirming the same or for requiring a special resolution of the company alone or in addition to an order confirming the alteration. (3.) Under s. 70 a copy of every special and extraordinary resolution has to be forwarded to and recorded by the Registrar. (4.) Sect. 120, which in its original form was confined to compromises and arrangements with creditors, does not provide expressly for any alteration of the memorandum, nor does it define the "extent" to which any such alteration may be carried, nor does it expressly or impliedly provide for any notice of the compromise or arrangement therein referred to or of the order of Court sanctioning the same being sent to the Registrar of Companies, whose file should, according to the apparent scheme of the Act, contain an accurate copy of or information relating to every memorandum of association and all alterations from time to time made in its terms. For the above reasons I am unable to accede to the prayer of this petition, but if desired I will allow it to stand over without prejudice to the right of the company to appeal in order that the requirements of s. 45 may, if possible, be complied with.

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(1) [1912] 2 Ch. 438.

(2) (1906) 8 F. 1135.

(3) [1913] 1 Ch. 226.

(4) [1910] 1 Ch. 414, 424.

J. R. B.

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The company appealed. The appeal was heard on December 16, 1913.

Younger, *K.C.*, and *H. E. Wright*, for the appellants. This scheme is not open to the objections taken by the learned judge.

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The sanction of the Court is necessary because the memorandum says that preferential rights are not to be interfered with upon an issue of new shares; but that sanction can be obtained under s. 120 of the Companies (Consolidation) Act, 1908. Sect. 45 deals only with two ways of altering the memorandum, namely, consolidation of shares of different classes and division of shares into shares of different classes: *In re Palace Hotel.* (1) We are not doing either of these things. Further, the deferred shareholders are not prejudiced; we only ask for sanction to the scheme. When it comes to the actual issue of the shares the deferred shareholders will have an opportunity of being heard. No alteration of the memorandum is involved as regards the deferred shareholders, for they are not within the protection given by article 5.

Sect. 120 was first enacted by the Joint Stock Companies Arrangement Act, 1870, s. 2, but it was then confined to arrangements between the company in liquidation and its creditors. It was held that the powers given by that section were very wide. The provision was extended to arrangements between the company and its members in a winding-up by the Companies Act, 1900, s. 24. But it was still confined to companies in liquidation, and that restriction was removed by s. 38 of the Companies Act, 1907.

Sect. 120 of the Companies (Consolidation) Act, 1908, is a re-enactment of those sections in equally wide terms. Sect. 45 of the Act of 1908 is a re-enactment of s. 39 of the Act of 1907, and the distinction has been preserved. It has always been the practice to approve under s. 120 schemes which alter the memorandum of association, although such alterations are also dealt with by s. 45, and s. 120 in terms deals with the rights of shareholders only; for such dealings imply modification of the memorandum. That may also be done under s. 41 after we have obtained the consent of the Court to this scheme, and of the shareholders to the issue of the shares.

A different view has been taken by Neville J. in *In re Australian Estates and Mortgage Co.* (2) and *In re Doecham*

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(1) [1912] 2 Ch. 438.

(2) [1910] 1 Ch. 414, 424.

Gloves. (1) In the last-mentioned case his Lordship decided that no scheme of arrangement which altered or affected the memorandum of association could be sanctioned under s. 120, and that the only ways in which a memorandum could be altered were those specifically mentioned in ss. 41 and 45. We ask the Court to overrule that decision and approve of *In re Palace Hotel.* (2) The proviso to s. 45 does not enlarge the scope of that section: *Rex* v. *Dibdin.* (3)

COZENS-HARDY M.R. This is an appeal from a decision of Astbury J. It raises the question whether this scheme of arrangement can be sanctioned except by proceeding under s. 45, the ground being that the scheme involves an alteration of the memorandum of association.

In the first place, does this scheme in any way interfere with the memorandum of association? The memorandum says this: "The capital of the company shall be 950,000*l.* divided into 300,000 preference shares of 1*l.* each, 300,000 ordinary shares of 1*l.* each, and 350,000 deferred shares of 1*l.* each with such respective rights as are defined by the articles of association registered herewith"—I need not read the clauses in the articles. They define with perfect clearness the priority which preference shares have over ordinary and the priority which ordinary have over deferred. The memorandum goes on to say: "and upon any increase of capital the company is at liberty to issue any new shares with any preferential deferred qualified or special rights privileges or conditions attached thereto but not so as to prejudice the preferential rights hereby attached to the preference and ordinary shares in the initial capital." It is very curious, the words "deferred shares" are not used in that clause.

Now what is proposed to be done is to increase the capital of the company by issuing ordinary shares to rank with the existing ordinary shares—to use a colloquial phrase, to "water" the ordinary share stock. It is a case in which the word "watering" has not the bad sense which it has in relation to many companies. It is an exceedingly prosperous company, and I hope that, by using that colloquial phrase, I am not in the least indicating an opinion that this is not a most proper proposal. But how does that "prejudice the preferential rights hereby attached to" the preference shares? Clearly not. How does it prejudice the preferential rights of the ordinary shares? I think it does not. "Preference" is something given over a lower class of shares; it is not "preference" between members of the same class. I, therefore, hold that this is not a case in which the memorandum is proposed to be altered in any way. What is proposed to be done is consistent with the memorandum.

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(1) [1913] 1 Ch. 226.

(2) [1912] 2 Ch. 438.

(3) [1910] P. 57, 123.

Therefore we are not really troubled to consider the question, but, as it has been raised, perhaps it is right I should say a few words upon the question whether, assuming that the construction of the memorandum was different, and that this did involve an interference with the memorandum, it is necessary to have a meeting under s. 45. Is it sufficient to have, as the company has had here, a meeting under s. 120? In other words, is it an arrangement within the meaning of s. 120, or is it something which falls within s. 45? Sect. 45 is a new power, first existing in 1907, consolidated and repeated in this statute. It is reasonably clear that it applies only to two cases. I will read the words: "A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes."

I think the true meaning of that is that s. 45 is to be limited to those two cases, and, unless you can predicate that the proposed reorganization involves either consolidation of shares of different classes or the division of shares into shares of different classes, you are outside s. 45 entirely.

Then it is said, "Oh, but the proviso which you find in the middle of s. 45 is really an independent enactment; it is not strictly a proviso upon the subject-matter of s. 45, sub-s. 1." I am unable to read that so. Parliament has given a new power, a power which did not exist before 1907, to make certain alterations in the memorandum in these two particular ways, namely, a special protection, requiring a much larger number of consents than would be required for an ordinary special resolution.

I, therefore, think that the judgment of Swinfen Eady J., as he then was, in *In re Palace Hotel* (1) was right, and the judgment of Neville J. differing from that view in *In re Doecham Gloves* (2) was incorrect, and with great respect to Astbury J., who has followed the judgment of Neville J., I am unable to agree with him.

For the reasons which I first gave I think the preliminary question should be answered in favour of the company, because I hold that the case does not at all interfere with the memorandum of association.

SWINFEN EADY L.J. I am of the same opinion. In my judgment, s. 45 of the Companies (Consolidation) Act, 1908, is confined to two modes of reorganizing the share capital, namely, (*a*) by the consolidation of shares of different classes, and (*b*) by the division of shares into shares of different classes. The proviso which immediately follows is a proviso limiting the effect of the previous part of the section. It was introduced in 1907. It is reproduced in this statute, not quite in the same form as in the Act of 1907. Under the Act of 1907 it was sufficient if the resolution was passed by a majority of shareholders of the class holding three-fourths of the share capital, and that language was open to the contention that, if the majority was three-fourths in value, the actual number was not material, it was a majority in value only. That construction is precluded by the amended form of the section as it appears in this consolidating Act. It is now not to be interfered with "except by a resolution passed by a majority in number"—those words "majority in number" are new—"of shareholders of that class holding three-fourths of the share capital." In my judgment this s. 45 only applies to the new method of reorganizing share capital first permitted by the Act of 1907.

With regard to the other portion of the case, I agree with the

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(1) [1912] 2 Ch. 438.

(2) [1913] 1 Ch. 226.

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opinion of the Master of the Rolls that the duplication, or the increase, of the ordinary shares in the present case is not an interference with any preference; and on that ground the decision of Neville J. in *In re Doecham Gloves* (1) was erroneous, because it proceeded on the footing that (2) "the duplication of the preference shares is an interference with the preference of the existing shareholders." I dissent from that.

Phillimore L.J. agreed with the other members of the Court on both points.

Solicitors: *Leonard & Pilditch.*

H. C. R.

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SARGANT J.
July 1, 2, 11.
C. A.
Dec. 17.

OMNIUM ELECTRIC PALACES, LIMITED *v.* BAINES.

[1912 O. 1289.]

Company—Promoters—Sale of Lease "agreed to be granted"—No binding Agreement at Time—Lease afterwards granted—Claim by Company to apportion Contract—Fiduciary Position of Promoters—Articles of Association restricting Liability of Promoters.

Promoters agreed to sell to a company incorporated for the purpose the benefit of a lease "agreed to be granted" to the promoters of certain premises, the purchase-money embracing that and other objects. At that date there was no agreement for a lease enforceable at law, but terms had been arranged and a lease was afterwards granted to the promoters pursuant to those terms and assigned by them to the company. In an action by the company claiming that the promoters were liable to make good to the company such part of the purchase-money as was attributable to the benefit of the lease "agreed to be granted":—

Held by the Court of Appeal (affirming the decision of Sargant J.), that, whether or not the lease was properly described as a lease "agreed to be granted," the company having in fact obtained all that they bargained for, and no secret profit having been made by the promoters, the company were not entitled to any relief.

Held, also, by Sargant J., that in any case the objection was an objection to the entire contract, and that relief could not be granted by way of apportionment of the purchase-money.

Per Sargant J.: The company having been promoted with a view to a sale of the benefit of the lease to the company by the promoters, the latter were not trustees for the company in the ordinary sense so as to prevent them from selling at a profit to the company.

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(1) [1913] 1 Ch. 226.

(2) [1913] 1 Ch. 231.

Per Sargant J.: Whether promoters are in fact acquiring any assets as trustees for a company is a question of fact; and where the whole scheme has been that the promoters are to sell to the intended company at a profit the assets which they are acquiring, the natural inference of fact is that, qua those assets, they are not intending to be trustees for the company, but are intending to occupy the relationship to the company of vendors. This relationship when coupled with promotion involves certain fiduciary duties, but it only confuses matters to identify such a fiduciary relationship with ordinary out and out trusteeship.

Per Sargant J.: An article of association of a private company providing that the company shall enter into a prepared agreement with promoters, and that no objection shall be taken to it, and that no promoter or director shall be liable to account to the company for any profit or benefit derived by him thereunder by reason of his being interested therein or of the board of directors not being an independent board, and that every member of the company present and future shall be deemed to become a member on these terms, will not relieve the promoters from the general equitable obligations recognized and enforced in *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218.

WITNESS ACTION.

This action was brought by the company against Thomas Baines and Christian Adolph Heussler. The statement of claim was as follows:—

"1. From some date prior to January 10, 1912, until the incorporation of the plaintiff company on March 25, 1912, the defendants were actively engaged in promoting the plaintiff company.

"2. On or about January 10, 1912, the defendants entered into negotiations with a Mr. Bexfield, the manager of the Harrow Road branch of the National Bank, Limited, for the grant by the said bank of a lease of certain premises belonging to the bank and known as Nos. 65, 67, and 69, High Road, Willesden. The defendants entered into and carried on the said negotiations as promoters of the plaintiff company.

"3. The negotiations in the preceding paragraph mentioned continued till the grant of the lease hereinafter mentioned, but there was never at any time any agreement between the said bank and the defendants or either of them for such grant.

"4. On March 25, 1912, the company was incorporated under the Companies (Consolidation) Act, 1908, as a private company limited by shares with the objects mentioned in the memorandum of association thereof. In clause 3 (*b*) of the said memorandum of association it was stated that the first operation of the company was to enter into the agreement therein more particularly referred to.

"5. By an agreement under seal, which is expressed to be dated March 25, 1912, and to be made between the defendants (thereinafter called the vendors) of the one part and the plaintiff company of the other part (being the agreement referred to in clause 3 (*b*) of the company's memorandum of association), it was agreed by and between the parties (amongst other things) as follows:—

"'(1.) The vendors shall sell and the company shall purchase the benefit of the lease agreed to be granted to the vendors of the premises known as Nos. 65, 67, and 69, High Road, Willesden, together with the benefit of the plans, &c., got out by the vendors for the conversion of a portion of the said premises for use as an electric theatre and the benefit of the arrangements made by the vendors for such conversion and their equipment as an electric theatre.

"'(2.) The vendors will use their best endeavours to obtain the consent of the lessors to an assignment of the said lease when granted to the company, but pending such assignment, or if the lessors will not consent thereto, the vendors shall hold the same as trustees for the company, and will for that purpose execute such declaration of trust or other documents as the company shall require, the company agreeing to indemnify the vendors and their respective estates in respect of the rent due under and the performance of the covenants and conditions contained in the said lease.

"'(3.) The vendors further agree with the company that they will pay and discharge the whole of the preliminary expenses connected with the formation and registration of the company, including registration fees, printing, solicitors' costs, and generally all expenses up to the first general allotment of shares.

"'(4.) The consideration to be paid by the company to the vendors under clauses (1.) and (3.) hereof shall be the sum of

1500*l.*, which shall be satisfied as to 250*l.* in cash, and as to the balance of 1250*l.* by the allotment and issue to the vendors or their nominees of 1250 fully-paid shares in the capital of the company.'

"6. On May 13, 1912, the said bank granted a lease to the defendants of the said premises Nos. 65, 67, and 69, High Road, Willesden, for a term of years as from March 25, 1912, at the rent and subject to the conditions and lessees' covenants therein mentioned and contained. The plaintiff company immediately thereupon entered into possession of the demised premises, and the said lease was shortly afterwards assigned by the defendants to the company.

"7. The consideration mentioned in clause 4 of the said agreement dated March 25, 1912, has been discharged as thereby provided. Such consideration was agreed between the parties, and the plaintiff company discharged the same as aforesaid upon the footing that at the date of the said agreement dated March 25, 1912, there was an agreement between the said bank and the defendants whereby the defendants were entitled to have a lease granted to them of the said premises Nos. 65, 67, and 69, High Road, Willesden. The defendants had in fact prior to the grant of the said lease no interest in and no rights in respect of the said premises. In the circumstances the said lease was granted to the defendants as trustees for the plaintiff company and they never had any beneficial interest in the demised premises."

The plaintiff company claimed (1.) a declaration that the defendants were as promoters of the plaintiff company liable to make good to the plaintiff company such part of the purchase-money of 1500*l.* under the said agreement dated March 25, 1912, as was attributable to the "benefit of the lease agreed to be granted" to the defendants of the premises known as Nos. 65, 67, and 69, High Road, Willesden, (2.) that the amount might be ascertained by the Court, and (3.) payment of the amount so ascertained.

The defendants put in separate defences not admitting the statements in the statement of claim and referring to article 3 of the company's articles of association, which was as follows: "The company shall forthwith enter into an agreement with

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Thomas Baines and Christian Adolph Heussler in the terms of the draft thereof a copy of which has for the purpose of identification been initialled by two of the subscribers to the memorandum of association; and the directors shall carry the same into effect, with full power nevertheless from time to time to agree to any modification of the terms of the said agreement either before or after the execution thereof. The basis on which the company is established is that the company shall enter into the said agreement on the terms therein contained subject to any modification (if any) as aforesaid; and no objection shall be taken to the said agreement, nor shall any promoter or director be liable to account to the company for any profit or benefit derived by him under the said agreement by reason of any promoters or directors of the company being interested in the said agreement, or of the board of directors not being in the circumstances an independent board, and every member of the company present and future shall be deemed to become a member of the company on these terms."

From the evidence, which is fully stated in the judgment, it appeared that the allegations in the statement of claim were substantially correct; that at the date of the agreement of March 25, 1912, the company had no independent board of directors; and that, though the defendants at that date had arranged the terms of the proposed lease with the lessors, there was no agreement enforceable at law binding on the lessors, and that this fact was not disclosed to the company.

The action came on for hearing before Sargant J. on July 1, 1913.

R. Rowlands, for the plaintiff company. It is the duty of a promoter to provide the company with an independent board of directors and to make full disclosure both of the facts which apply to the property and would influence the company in deciding as to its acquisition and also of the promoter's own interest: *Erlanger* v. *New Sombrero Phosphate Co.* (1); *In re Olympia.* (2) The defendants failed to perform their duties in these respects. It was for the company, if the true facts had been

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(1) 3 App. Cas. 1218.

(2) [1898] 2 Ch. 153, 164 affirmed in H. L. sub nom. *Gluckstein* v. *Barnes* [1900] A. C. 240.

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disclosed, to decide whether they would go on with the negotiations for the lease or come to their own terms with the lessors. No such opportunity was afforded them, and no independent board of directors would have paid the price for the mere prospect of a lease which was all that the promoters had to sell. Further, the defendants were all along in the position of trustees for the company, and whatever they had to assign to the company was in equity the property of the company. On either ground, rescission having now become impossible, the company is entitled to the relief claimed: *In re Olympia*. (1) If necessary I ask leave to amend the statement of claim so as to raise the case against the defendants resting not on fraud, but on breach of duty as promoters and on trusteeship.

F. H. Maugham, for the defendants. I do not object to an amendment so far as relates to the fact that there was at the time no independent board of directors, or that the defendants did not disclose the fact, if it be a fact, that they had no agreement for a lease enforceable at law, but to allow any further amendment would be to raise a totally new case.

As regards the case raised by the pleadings no ground for relief has been shewn. There is no claim for rescission, and the company cannot adopt the contract and claim an account of profits in the absence of fraud or dishonesty: *In re Cape Breton Co.* (2) *In re Olympia* (1) was a case of fraudulent misrepresentation. There is no authority for apportioning the purchase-money payable under a contract adopted by the company, and moreover the company in fact got all they bargained for, and the question whether the agreement with the lessors was one enforceable within the Statute of Frauds or not—which can hardly be decided in these proceedings—became immaterial when the lease was once granted. The case for relief so far as it is based on trusteeship is not sufficiently raised by the pleadings as they stand; but there is no authority to shew that promoters, though standing in a fiduciary relation to the company, are incompetent to sell to the company, and in

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(1) [1898] 2 Ch. 153, 164; affirmed in H. L. sub nom. *Gluckstein* v. *Barnes* [1900] A. C. 240.

(2) (1885) 29 Ch. D. 795; affirmed in H. L. on other grounds (1887) 12 App. Cas. 652.

In re Leeds and Hanley Theatres of Varieties (1) the Court of Appeal refused to decide the case on that ground. The judgments of the Court of Appeal in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (2) shew that some of the passages in *Erlanger* v. *New Sombrero Phosphate Co.* (3) relate to the particular facts of that case and are not of general application.

I further submit that article 3 of the articles of association of the company is fatal to the plaintiffs' claim.

R. Rowlands in reply. Article 3 of the articles of association cannot evade the general equitable obligations imposed on promoters by law. The defendants were contemplating the incorporation of a company from the very beginning of their negotiations for the lease, and were in the position of trustees for the company or intended company, and under those circumstances they are bound to account for the profit to their cestui que trust: Palmer's Company Precedents, 11th ed. pt. i. pp. 132, 133; *Hichens* v. *Congreve* (4); *Tyrrell* v. *Bank of London* (5); *In re Ambrose Lake Tin and Copper Mining Co.* (6); *In re Cape Breton Co.* (7); *Ladywell Mining Co.* v. *Brookes.* (8) *In re Cape Breton Co.* (7) was explained by Lindley M.R. in *In re Olympia* (9), where he says, "No one decided in that case that as a general proposition the mere fact that a contract for purchase by a company cannot be rescinded precludes the company from obtaining from the vendor if he is a promoter, and still less if he is also a director, a secret profit made by him at its expense." Fraud or dishonesty will no doubt aggravate the case, but the real ground on which the authorities proceed is that the promoter from the commencement of the promotion is a trustee for the company.

Cur. adv. vult.

July 11. SARGANT J. delivered the following written judgment: In this case the plaintiff company seek a declaration that the defendants are as promoters of the plaintiff company liable to make good to the plaintiff company such part of certain purchase-money of 1500*l.* payable under an agreement dated March 25, 1912, as was attributable to "the benefit of the lease agreed to be granted to the vendors of the premises known as Nos. 65, 67, and 69, High Road, Willesden," mentioned in clause 1 of the said agreement, and as consequential on the foregoing declaration the plaintiffs ask for the ascertainment by the Court of the amount for which the defendants are declared liable and for payment of the amount when ascertained. Both the relief sought and the pleading by which it is supported are of an unusual character and will have to be scrutinized very carefully in a later part of this judgment. But for the moment it will be well to state the principal facts that have been proved or admitted before me.

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(1) [1902] 2 Ch. 809.

(2) [1899] 2 Ch. 392, 424, 425, per Lindley M.R., 444—446, per Rigby L.J.

(3) 3 App. Cas. 1218.

(4) (1829) 1 Russ & My 150.

(5) (1862) 10 H. L. C. 26.

(6) (1880) 14 Ch. D. 390.

(7) 29 Ch. D. 795; 12 App. Cas. 652.

(8) (1887) 35 Ch. D. 400.

(9) [1898] 2 Ch. 170.

At the beginning of the month of January, 1912, a Mr. Boeer was in negotiation with a Mr. Bexfield, the manager of the Harrow Road branch of the National Bank, Limited, for the grant of a lease of certain property belonging to the bank and known as Nos. 65, 67, and 69, High Road, Willesden, which appeared to be suitable for conversion into a moving picture theatre or cinema show, and on January 10, 1912, he deposited with Mr. Bexfield a sum of 10*l.* as a deposit or earnest of good faith. On the next day negotiations commenced between him and the defendants Baines and Heussler for the acquisition by them from him of his interest in the proposed enterprise upon certain terms which it is not necessary to set out at length, but which included the payment to Boeer of a sum of 120*l.*, subsequently reduced to 80*l.* The defendants Baines and Heussler immediately proceeded to get into communication with Mr. Bexfield, and the latter, after very properly obtaining the assent of Boeer to the substitution of the defendants, proceeded to deal with them and to take up their references. These being found satisfactory, Mr. Bexfield on January 30, 1912, obtained the authority of his directors to proceed with the letting of the property to the defendants, and on January 31 wrote to them informing them of the fact, whereupon the defendants immediately telegraphed to Boeer that they had been accepted.

There can be no doubt but that by this time the whole of the main terms of the lease had been arranged and that all that remained to be settled was such matters as the approval of the plan by the bank's surveyor and the approval of the form of the lease by the bank's solicitors. Mr. Bexfield in the course of cross-examination was quite clear on this point, and there is no question but that the defendants were put into communication with the bank's surveyor and the bank's solicitors for the purpose of giving formal effect to the terms that had been substantially arranged. In my judgment the matter from a commercial and business point of view was agreed, and either the proposed lessees or the proposed lessors might well regard and speak of it as agreed even at that time, and still more at a later date towards the end of March when the matter had further progressed without a hitch. But from the strict legal point of view I think and find as a fact that there was never any complete or binding agreement before the actual execution of the lease, which did not take place till May 13. It was always possible, however improbable, that the matter might go off on some hitch or difficulty in regard either to the plans or to the precise terms of the lease, and until the complete adjustment of all these terms and the execution and exchange of the lease and counterpart the matter in my judgment had not as a question of law passed the boundary between negotiation and agreement.

In the month of February, or at any rate in the early part of that month, Boeer was still in communication with an architect named Clarke Ashworth, whom he had proposed to employ, and towards the end of that month difficulties arose between Boeer and the defendants as to the terms of the transfer, and Boeer declined to hand over a plan which Mr. Clarke Ashworth had prepared. But these differences were ultimately adjusted on the terms that Boeer was to be paid 80*l*., to include the deposit of 10*l*. made by him with Mr. Bexfield, and on March 26, 1912, Boeer gave Bexfield an authority, which was acted on, to pay over the 10*l*. to the defendants.

In the meantime the defendants had consulted a solicitor, Mr. Skan, of the firm of Romer & Skan, and had called on

Mr. Beard, the surveyor of the bank, and had proceeded to employ a fresh architect, Mr. Wilson, in whose hands they placed the sketch plan which had been prepared by Mr. Clarke Ashworth. This plan was too small to be of any material service to Mr. Wilson, and he got out larger plans of his own, though on the same general scheme, which he said was the only practicable one, and called on Mr. Beard about the middle of March, when the latter appears to have expressed some general approval of them, but to have required a proper set to be left with him before he gave his definite approval. Mr. Skan on his part had got into communication with the solicitors of the bank, Messrs. Tatham & Lousada, and had requested them to prepare a draft of the proposed lease for consideration. But they appeared not to have been prepared so to do until they had the plans. And, though they were told on or about March 16 that the plans were provisionally or generally approved by Mr. Beard, they did not send any draft of the proposed lease to Mr. Skan until the beginning of April.

The memorandum and articles of the company had been prepared by Mr. Skan on the instructions of the defendants. Some delay took place in the registration of the company owing to a difficulty as to its name, but ultimately it was registered on March 28, 1912. The proposed agreement between the defendants and the company had also been prepared by Mr. Skan, and article 3 of the articles of association contained imperative directions that the company should forthwith enter into this agreement, though the directors were to be at liberty to agree to any modifications of its terms either before or after its execution. The company was registered as a private company, and the four signatories of the memorandum were nominees of the promoters. These signatories had the power of appointing the first directors of the company, and this they exercised on March 25 by appointing a Mr. Twiss, a Mr. Hodges, and the defendant Baines, two of whom, Mr. Hodges and the defendant Baines, purported to hold a board meeting on that day. At a subsequent board meeting on March 28, 1912, at which again only Mr. Hodges and the defendant Baines were present, the agreement of March 25, 1912, was approved, and it was resolved to affix the seal of the company thereto. It has not been contended before me, nor do I think that it would have been possible to seriously argue, that this amounted to an adoption or approval of the agreement by an independent board of directors, or that apart from the special provisions of the articles of association of the company, to which I will refer later, there were any circumstances in this case to prevent the transaction being one in which the promoters occupied a direct fiduciary position to the company with all the consequences pointed out in *Erlanger* v. *New Sombrero Phosphate Co.* (1)

The more material provisions of this contract were comprised in clauses 1, 2, 3, and 4, which are set out in full in the statement of claim. The property agreed to be purchased is described as "the benefit of the lease agreed to be granted to the vendors of the premises known as Nos. 65, 67, and 69, High Road, Willesden, together with the benefit of the plans, &c., got out by the vendors for the conversion of a portion of the said premises for use as an electric theatre and the benefit of the arrangements made by the vendors for such conversion and their equipment as an electric theatre." The defendants agree to pay all preliminary expenses in the usual terms; and the purchase price is fixed at 1500*l.*, to be satisfied as to 250*l.* in cash, and as to the balance of 1250*l.* by the issue to the defendants of 1250 fully-paid shares of 1*l.* each in the company. Cash shareholders to the extent of some 550*l.* were brought in on March 28, 1912, mainly apparently through the defendant Baines.

The remainder of the history can be briefly stated. The lease was granted to the defendants in accordance with the terms arranged on May 13, 1912, and was shortly afterwards, namely, on June 4, 1912, assigned to the company. A Mr. Sheen was appointed a director in the place of Mr. Hodgson on May 16, 1912. A Mr. Holland and his wife were allotted 250 shares for cash on June 17, 1912. The vendors' shares were allotted to the defendants and their nominees on June 28, 1912; the statutory meeting of the company was held on July 16, 1912; and on July 29, 1912, Mr. Holland, in accordance with an arrangement made when he and his wife took up their 250 shares for cash, was appointed an additional director of the company. It was certainly not until after this date that the company can be said to have had an effective independent board, and Mr. Maugham assented to the date being put as late as about September 11, 1912, when Mr. Baines retired from the directorate.

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(1) 3 App. Cas. 1218.

Mr. Holland appears to have gone fully into the position of the company, which by this time or soon after was in urgent need of funds. These were shortly afterwards raised by the issue of five debentures of 250*l.* to five of the principal cash shareholders of the company on the terms of an agreement dated September 16, 1912, and made between the company of the one part and Mr. Holland of the other part, which is of a curious character and provides for the bringing of proceedings by the company against the defendants under the direction of Mr. Holland and for the receipt of the fruits of the litigation by Mr. Holland as trustee for the debenture-holders and its subsequent distribution between them as a bonus. On October 30, 1912, the writ in this action was issued, and on December 23, 1912, the statement of claim was delivered.

It now becomes necessary to examine with some minuteness this statement of claim, which is signed by a counsel of great experience, but not the counsel who argued the case before me. On doing so it is observable that it makes no claim either for rescission of the contract as in *Erlanger* v. *New Sombrero Phosphate Co.* (1), or for repayment of secret profit as in *Gluckstein* v. *Barnes.* (2) There were obvious difficulties in the way of either claim even apart from article 3 of the articles of association of the company. For, although there might have been originally on the constitution of an independent board, and probably was, a good case for rescission of the contract by the company, this right was one which required to be exercised promptly and had not been so exercised. Indeed, so far from this being the case, the company seem after discovery to have elected to affirm the contract and not to have desired or even now to desire to give up the lease of the theatre.

Further, as regards a claim for profits, not only is it doubtful whether such a claim can be enforced against vendors, as against whom rescission was quite possible, but there appears to be no reported case in which such a claim has succeeded in the case of a price openly and avowedly paid to the vendor promoter from whom restitution is sought. At any rate, whatever the reason, the statement of claim carefully and markedly abstains from any allegations of misconduct or impropriety on the part of the defendants, such as that they caused the company to enter into an improvident bargain or one that resulted in any undue profit or advantage to themselves, or that they withheld information from the shareholders or did not provide the company with a proper independent board of directors, and indeed there is not even an allegation that the defendants had made any profit at all on the transaction. On all these points and generally the statement of claim is quite colourless and appears to be of an almost friendly character, and to be designed to lead up to, as indeed it claims, such relief only as is supposed to arise by reason of the bare legal relationship of the parties.

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(1) 3 App. Cas. 1218.

(2) [1900] A. C. 240

At the hearing no application was made to me to amend the pleading so as to turn it into a claim for rescission, but an application was made to allow the introduction of allegations suggesting that there had been non-disclosure by the defendants and breach of duty on their part and the obtaining of a price which was excessive and such as no independent board would have sanctioned, and also to allow an amendment of the claim for relief so as to ask for the payment to the company of the profits made by the defendants. But it appeared to me that this would be to allow the plaintiffs to make a case which was entirely new and which the defendants had not had an opportunity of testing by discovery, particulars, and so on. And accordingly I refused leave to amend in these respects, though for the purpose of more fully dealing with the claim actually or impliedly made by the pleading as hereinafter mentioned I treated the claim as amended by allegations to the effect that at the material times (1.) the company had in fact no independent board, and (2.) there was no disclosure to the company of the alleged fact that no binding agreement for a lease existed at the date of the contract.

I will now deal with the principal and obvious case raised by the statement of claim, which is, as I read it, that the plaintiff company are entitled to an abatement or reduction of the purchase price on the ground that, whereas they purported to sell a lease to which they had a title resting in definite agreement, they had in fact no binding agreement for such a lease and nothing more than an expectation of getting it, and accordingly that the main consideration for the purchase price was wanting. Both the case so made and the relief so claimed are novel and fail to commend themselves to my judgment. Whether or not the lease might have been fairly described at the time as "agreed to be granted" it was in fact subsequently granted in accordance with the agreement or negotiation referred to, and the company have in fact obtained all that they were intended to get and have suffered nothing by reason of the so-called agreement having been unenforceable in a legal sense. And further any objection on this ground is in my opinion an objection to the whole agreement and may give a right to resist specific performance of the whole agreement, but cannot give any right to apportion the contract and merely seek a diminution of price without any contributing equivalent. To give effect to such a claim would be to impose a totally new contract on the defendants and would also result in depriving them of the bulk of their purchase-money without restoring to them the principal asset with which they had parted. Nor can I accept the argument put forward by Mr. Rowlands that the defendants should have informed the company of the fact that there was no actual agreement and given the company the opportunity of competing with the defendants for the grant of the lease without any premium or payment. This seems to me neither good business nor good sense. For these reasons I reject this claim.

But it has been strongly urged on me that the statement of claim covers or includes another case, namely, the case that the defendants were throughout trustees for the company of the lease or the agreement for it or the prospect of obtaining it, and so were necessarily disqualified from charging the company anything for it, and must return to the company such part of the price as represents its value. On the whole, though with much

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hesitation, I was inclined to think that the allegations in the last sentence of paragraph 2 and the last sentence of paragraph 7 of the statement of claim might be read as containing or implying such a case as this. And as by that time the cases of both the plaintiffs and the defendants had been closed without the giving of certain evidence by the defendant Baines which might be material on this point, I allowed him to be recalled and afterwards allowed evidence in rebuttal to be given by Mr. Holland. In the result, however, this additional evidence was not of much, if any, assistance on the case so made, which, so far as the plaintiffs' case was concerned, was rested mainly if not entirely on a view of the law which is stated in the following passage of Sir Francis Palmer's Company Precedents, 10th ed. pt. i. p. 118, 11th ed. pp. 132, 133: "The question when the status of a promoter was first acquired is occasionally one of great moment, especially where the promoter resells to the company at a profit property recently acquired by him; for if he bought before he became a promoter he may resell to the company at a profit, subject only to making due disclosure: *Erlanger* v. *New Sombrero Phosphate Co.* (1) Whereas, if he bought after beginning to promote, the position is infinitely more onerous. The company in such case is entitled to treat the promoter as having acted on its behalf in acquiring the property, and to insist on taking it at the price the promoter gave for it: *Hichens* v. *Congreve* (2); *Tyrrell* v. *Bank of London* (3); *In re Ambrose Lake Tin and Copper Mining Co.* (4); *In re Cape Breton Co.* (5); *Ladywell Mining Co.* v. *Brookes.* (6) And no disclosure on the part of the promoter will enable him to retain the profit, for the property is in equity not his but the company's; that is to say, it is impressed in the promoter's hands with a trust for the company." This view of the law, though a convenient statement of Mr. Rowlands' argument, is not entitled to be treated as an authority; and is perhaps hardly quite consistent with a further passage in the same volume, 10th ed. at the top of p. 122, 11th ed. p. 137. Further, after having very carefully examined all the authorities cited by

(1) 3 App. Cas. 1218.
(2) 1 Russ. & My. 150.
(3) 10 H. L. C. 26.
(4) 14 Ch. D. 390.
(5) 29 Ch. D. 795.
(6) 35 Ch. D. 400.

the learned author, I have come to the conclusion that they do not support the proposition laid down by him. Whether promoters are in fact acquiring any assets as trustees for a company must, in my judgment, be a question of fact; and where as here the whole scheme has throughout been that they are to sell to the intended company at a profit the assets which they are acquiring, the natural inference of fact is that, qua those assets, they are not intending to be trustees for the company, but are intending to occupy the relationship to the company of vendors. That this relationship when coupled with promotion involves certain fiduciary duties is undoubted, and the breach of those duties may involve unpleasant legal consequences, as in *Erlanger* v. *New Sombrero Phosphate Co.* (1), *Gluckstein* v. *Barnes* (2), and numerous other cases. But it is only confusing matters to identify such a fiduciary relationship with ordinary out and out trusteeship, and I think that the difference is clearly recognized in *Erlanger* v. *New Sombrero Phosphate Co.* (1) and *Ladywell Mining Co.* v. *Brookes* (3), particularly at pp. 410 and 411, and above all in *In re Leeds and Hanley Theatres of Varieties.* (4) In the last case indeed the distinction in question forms the foundation of the marked difference between the reasoning in the judgments of the members of the Court of Appeal, and particularly of Vaughan Williams L.J., and that in the judgment of Wright J. On this view of the case I am in favour of the defendants.

I should add that I am unable to accept the argument pressed upon me by Mr. Maugham that the provisions of article 3 of the articles of association of the company in this case and the fact that the company was a private company were alone sufficient to negative any claim whatever by the company against the defendants whether for rescission or otherwise. In my judgment promoters cannot relieve themselves of the general equitable obligations recognized and enforced in *Erlanger* v. *New Sombrero Phosphate Co.* (1) by any astuteness in the drafting of the regulations which they prepare for their company. And where as here, though the company is formed as a private company under the statute, the intention throughout is to bring in outside cash

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(1) 3 App. Cas. 1218.
(2) [1900] A. C. 240.
(3) 35 Ch. D. 400.
(4) [1902] 2 Ch. 809.

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shareholders, the situation appears to me identical in essentials with one in which the company is an ordinary public company.

In the result, however, for the reasons previously stated, I am in favour of the defendants and accordingly dismiss the action with costs.

A. C.

From this decision the plaintiff company appealed. The appeal was heard on December 17, 1913.

C. A.

R. Rowlands, for the appellants, repeated the arguments urged by him in the Court below.

[Swinfen Eady L.J. referred to *Bentinck* v. *Fenn.* (1)]

Maugham, K.C., and *W. A. Greene*, for the respondents, were not called upon to argue.

Cozens-Hardy M.R. This is an action by a company against two gentlemen, Mr. Baines and Mr. Heussler, who entered into an agreement with the company (clause 1) to sell to the company the benefit of the lease agreed to be granted to the vendors of three houses in High Road, Willesden, together with the benefit of the plans, &c., got out by the vendors for the conversion of a portion of the premises for use as an electric theatre, and the benefit of the arrangements made by the vendors for such conversion and their equipment as an electric theatre. Three things, it is to be observed, are mentioned in that clause—the intended lease, the plans got out for conversion into an electric theatre, and the benefit of certain arrangements for conversion of the property. Only a portion of the property, I gather, was to be converted into an electric theatre. The arrangement was (clause 2) that the vendors would do all they could to obtain the consent of the lessors to an assignment of the lease, and pending such assignment, or if they could not obtain the consent to assign, the vendors would declare themselves trustees for the company. The vendors further agreed with the company (clause 3) that they would pay all the preliminary expenses connected with the formation and registration of the company, including certain specified items. Clause 4 provided: "The consideration to be paid by the company to the vendors under clauses (1.) and (3.) hereof shall be the sum of 1500*l.* which shall be satisfied as to 250*l.* in cash, and as to the balance of 1250*l.* by the allotment and issue to the vendors or their nominees of 1250 fully-paid shares in the capital of the company." On May 13, 1912, the lessors granted a lease of the premises to the defendants for a term of years from March 25, 1912, the plaintiff company entered into possession, and they have since taken an assignment of the lease from the defendants and they are now in possession under the lease. The consideration which was stipulated to be paid to the vendors or their nominees, 250*l.* in cash and the balance in shares, has been paid. It is said, and this is a peculiar feature of the case, that the consideration mentioned in clause 4 was agreed upon between the parties and the plaintiff company on the footing that at the date of the agreement there was an existing agreement between the bank and the defendants whereby the defendants were entitled to have a lease granted to them of the premises. The defendants had in fact prior to the lease no interest in and no rights in respect of the premises. The plaintiffs ask for a declaration that the defendants are as promoters of the company liable to make good to the plaintiff company such part of the purchase-money of 1500*l.* payable under the agreement as is attributable to "the benefit of the lease agreed to be granted to the vendors of the premises known as Nos. 65, 67, and 69, High Road, Willesden," mentioned in clause 1 of the said agreement, and they ask that the amount may be ascertained by the Court and for payment of the amount when ascertained.

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(1) (1887) 12 App. Cas. 652.

Now, that is a very remarkable statement of claim, and the case differs most materially from any case with which I am familiar that has ever risen between a company and persons who were promoters. The bank, who were the lessors of the property, had been approached by a gentleman named Boeer with a view to the taking of a lease of the three houses, and Boeer, as an earnest of good faith, deposited 10*l.* with the bank. The defendants on January 10, 1912, before it is even suggested that there was an overt act of promotion, put themselves in communication with Boeer and the bank, the result of which was that Boeer stood aside and the bank entered into negotiations with Baines and Heussler, and after the usual delay in a matter of this kind, because the plans had to be approved of by the bank's surveyor and the draft lease had to be settled by the bank's solicitors, the lease which was actually granted was executed. It is true, I think, and so the learned judge found, and I am not at all disposed to differ from him, that there was no moment of time prior to the granting of the lease when that which was mere negotiation had ripened into a formal enforceable agreement. It may be, and I assume it to be so, that no action for specific performance could have been maintained by the defendants against the bank, but negotiations were going on in perfect good faith according to business methods, and there was no impropriety, I think, certainly not in the business or commercial sense, in treating the matter as one in which the defendants were in a position to claim the lease which they actually got from the bank. I entirely fail to see that there is any reason for saying that so much of the purchase-money as represents the benefit of the lease ought to be returned, because although the company ultimately got the lease and are now in possession under the lease, yet at the date of the contract the vendors had not perfected their title to it. That contention seems to me to be entirely without foundation, the company having, as I say, got that which they bargained for, namely, the assignment of the lease to the defendants from the bank.

But then it is said that the agreement was one between the promoters and the company and that the severe consequences resulting from that relationship ought to follow. Now, what are those consequences? They are primarily rescission if there is anything kept back, but that is out of the question here. It is not asked for and it could not be asked for, because the plaintiff company are now in possession, and the contract has been independently confirmed.

Then it is said that there was a secret profit, but I can see no element of secrecy at all in the matter. If I look at clause 3 (*d*) of the memorandum of association I see that the first obligation of the company is to enter into the agreement referred to and to carry the same into effect. When I look at article 3 of the articles of association I find that it says that "no objection shall be taken to the said agreement, nor shall any promoter or director be liable to account to the company for any profit or benefit derived by him under the said agreement by reason of any promoters or directors of the company being interested in the said agreement, or of the board of directors not being in the circumstances an independent board, and every member of the company present and future shall be deemed to become a member of the company on these terms."

It is not necessary to express any opinion one way or the other as to whether that article would have the slightest effect in an action for rescission. This is not an action for rescission. The fact is that this is not a case of secret profit at all; it is profit disclosed in perfectly plain terms. The agreement itself discloses the whole consideration. Every fact is stated, the property to be sold, the consideration to be paid, in short, everything is shewn. There is no consideration beyond that at all. There is no secrecy in the matter, and there is nothing of that which, so far as I am aware, has always been deemed to be essential in these cases to enable you to ask either for rescission or for a declaration that a promoter is liable for secret profit which he has kept back and has not disclosed. The case of *Lydney and Wigpool Iron Ore Co.* v. *Bird* (1) was a very good illustration of a case of secret profit. There, speaking generally, the company had been induced to enter into a contract for the purchase of certain mines the consideration being stated to be 100,000*l.*, whereas in fact it was not 100,000*l.* that was to be received by the vendors, because 10,800*l.* went to Bird, a promoter of the company. That was a secret profit: it did not appear on any of the documents relating to the company at all, and, that being so, the promoter who concealed it was held liable to make good the secret profit after certain allowances to him for promotion expenses. Here the plaintiffs at the trial applied to the learned judge for leave to amend in order to raise a case of secret profit, but the learned judge declined to allow any such amendment, and, if I may respectfully say so, quite properly declined to allow the plaintiffs to turn the action into that which it certainly was not on the statement of claim as delivered.

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(1) (1886) 33 Ch. D. 85.

In my opinion there is no ground whatever for making a precedent of this appeal with regard to apportioning the purchase-money and in effect giving relief to the plaintiffs on the assumption that secret profit has been received. There is no ground for that. I think that the judgment of Sargant J. was perfectly right, and the appeal must be dismissed with costs.

SWINFEN EADY L.J. I am of the same opinion. The only difficulty that presents itself in the case is to see exactly what the plaintiff company's case really is and what they claim. It is a claim by a going company against two persons, Baines and Heussler, who were vendors to and promoters of the company, and who arranged to sell the benefit of a lease agreed to be granted to them. The action does not claim rescission. It is common ground that there can be no rescission. Although there was only a verbal agreement to grant the lease to the vendors, the lease was granted, and it was duly assigned to the plaintiff company, and they have received all that they bargained to obtain. There is no question whatever about it, so that rescission is out of the question.

Then the action does not claim damages for deceit, and from beginning to end of the statement of claim there is no reference to such a claim.

Now, is it an action for a secret profit? I have great difficulty in finding that it is even that. There is no allegation of secrecy at all. The only allegation is really this—that at the time when the defendants agreed with the company to sell to the company the benefit of the lease agreed to be granted there was no agreement in writing sufficient to satisfy the Statute of Frauds. That is, as far as I can see, their real point, and it is part of the case—not that the negotiations were not bona fide and that they had not arrived at a point when in all probability they would be carried out, as they were in fact carried out, but that there was no written agreement.

Then the pleader has apparently proceeded upon this ground —that, because there was no written agreement, therefore the vendors had no interest whatever until the actual grant of the lease to them, and that inasmuch as when the lease was granted they were promoters of the company the lease was granted to them as trustees for the company. That is really what it means, I think. They say that the defendants had in fact prior to the granting of the lease no interest in and no rights in respect of the premises, the truth being that there was only a verbal arrangement, and in those circumstances the lease was granted to the defendants as trustees for the plaintiff company, and the defendants never had any beneficial interest in the demised premises. I think that that is the sort of case that it is intended to make—that the defendants really have sold to the company the company's own property; that the lease was granted to the defendants as trustees for the company and the defendants simply sold to the company the company's own property. The learned judge at the trial thus referred to the application to amend. He said: " At the hearing no application was made to me to amend the pleading so as to turn it into a claim for rescission, but an application was made to allow the introduction of allegations suggesting that there had been non-disclosure by the defendants and breach of duty on their part and the obtaining of a price which was excessive and such as no independent board would have sanctioned, and also to allow an amendment of the claim for relief so as to ask for the payment to the company of the profits made by the defendants. But it appeared to me that this would be to allow the plaintiffs to make a case which was entirely new and which the defendants had not had an opportunity of testing by discovery, particulars, and so on. And accordingly I refused leave." He puts those heads of relief out of the question, and then he treats the claim as amended in two respects, and I think that the appellants are entitled to the full benefit of that amendment.

It is first alleged that the company had no independent board in fact, and that is clear and not disputed; secondly, that there was no disclosure to the company of the alleged fact that no binding agreement for a lease existed at the date of the contract. There was no written agreement, but there was a verbal agreement, as I have said, and it in fact ripened into a lease which was duly assigned to the company, and the company had the full benefit of everything they expected to obtain.

Then Mr. Rowlands urged secrecy. I am quite satisfied that there was no secrecy from beginning to end. It is unusually free from any element of that kind. It is to be observed that there is no promoting syndicate, no concealment of the real vendors, and there is no intermediary. The contract for sale is made by Baines and Heussler, the defendants. It is disclosed in the memorandum of association which refers to the articles, and the articles refer to the contract. One of the objects of the company is to enter into the agreement which is disclosed in the articles, and the agreement recites that the company has been formed, and then it recites clause 3 of the articles, and describes the vendors as Baines and Heussler. Their names are disclosed. The agreement is for the sale of the benefit of the lease, and that the company have obtained, and also the benefit of certain plans and the benefit of certain arrangements made by the vendors for the conversion of the buildings and their equipment as an electric theatre. In addition to that it was also part of the terms of the contract that the vendors were to pay all the preliminary expenses connected with the formation and registration of the company, including registration fees, printing, solicitors' costs, and generally all expenses up to the first general allotment of shares. The whole of those considerations the company obtained, and they were to pay 1500*l*., 250*l*. in cash and 1250*l*. in shares. This is a curious and noteworthy fact with reference to the statement of claim; it does not allege that all the negotiations, the plans and the arrangements and so on, were entered into or obtained by the defendants as trustees for the company. It obviously and purposely abstains from doing that. The declaration asked for is set out in the statement of claim in paragraph 1 of the prayer in inverted commas, taking the language from the agreement for sale. It restricts the claim to part of the premises agreed to be sold: "the benefit of the lease agreed to be granted to the vendors of the premises known as Nos. 65, 67, and 69, High Road, Willesden." Those words are taken from the agreement for sale. With regard to the rest of the parcels in paragraph 1, the plans, the benefit of the arrangements, and the conversion and equipment, it does not allege that those arrangements were made by the defendants as trustees for the company. In substance it comes to this—that the claim seems to be framed upon the idea that, although rescission is impossible, what ought to be done is to obtain some apportionment of the price upon the notion that the defendants parted with nothing as regards the lease, and therefore there ought to be some equitable apportionment so that the company might have the rest of the parcels at some apportioned price.

In my opinion the claim fails altogether. It fails on the allegation that there was not sufficient disclosure, because all the facts are really disclosed. It fails at the outset because it does not establish that the defendants were entering into these negotiations as trustees for the company, or in their capacity of promoters. In fact the negotiations began before the company was promoted at all, and in my opinion the defendants were not in any shape or form trustees or agents for the company when they obtained the verbal agreement for a lease, and the company are not entitled to have any apportionment made of the purchase-money. In fact they have obtained all that they were to obtain by the contract and for which they were to pay 1500*l*. The company have no ground for complaint, and I think that the action wholly fails.

PHILLIMORE L.J. I am of the same opinion. The argument in this case has taken a somewhat wide range, and we have discussed various matters which probably are not material to the decision. That naturally follows from the fact that in the statement of claim there are two lines of thought running and two ways of putting the plaintiff company's case, and Mr. Rowlands, who, if I may repeat what I said during the argument, seemed to me to argue the case admirably, has rather tried to support the case on a third ground.

As I understand it, the three ways in which the case is put by the company against the defendants are these: " we are claiming to get back money first because you got a portion of it by representing that you had something to sell to the company which you had not to sell; secondly, because you represented that you were selling something to the company which you as agents of the company had already bought, and which therefore you could not sell; and thirdly, because in some way you have made a secret profit." The first and second points seem to scintillate —to appear and disappear again from time to time—in the statement of claim; but the third never appears at all. I am glad to say that, on the whole, I have come to the conclusion that one need not decide this case against the plaintiff company because of any defect in the pleadings. After hearing all we have heard, I think that the case could not have been put in any way, given the events which have happened, which would have entitled the plaintiff company to any relief against the defendants. They could have rescinded, or I assume that they could have rescinded, but it is too late to rescind; and therefore that kind of relief is out of the question.

Now, what is left?—damages for deceit. "You represented that you would sell to us the benefit of a lease which had been agreed to be granted to you. 'Agreed to be granted' means a binding legal agreement, but you had nothing of the kind." The answer is that, assuming the deceit, there is no damage. It is injuria sine damno. How is the company worse off because the vendors put too high the claim that they had got on the lessors? If the vendors had failed to get a lease and had got the money on the footing that they had an agreement for a lease which could be enforced, then there would be damages for deceit; but assuming that the plaintiff company put the highest construction on these words in the agreement, no damage followed from it. The vendors have been able to get the lease, the company have the benefit of it, and they are none the worse off.

Then it is said, "But by the time the vendors got the lease, they were trustees for the company." Perhaps they were, but they did not sell the lease; what they sold was something before that—the benefit of their agreement for a lease, and that benefit they did not get as trustees for the company, because the company did not then exist. They got it possibly as promoters or possibly on their own account—I do not think it matters which. If they got it as promoters, the only obligation upon them then is not to make any secret profit out of it, and they made no secret profit. They may have exaggerated the amount of claim that they had upon the lessors; but that is all that it comes to. The only possible case which can be made against them is that there was a duty on them to disclose the state of affairs to the company as soon as it was formed and before they got the lease themselves and to say, "Now, mind you, we have been pretending that we have a firm agreement with the bank, but we have not that, and if you like you can go and outbid us." Not doing that may or may not be a moral defalcation on the part of the defendants,—I do not say that it is or that it is not—but there is neither secret profit nor trusteeship nor rescission nor damages for deceit.

Therefore, on all these grounds I think the appeal fails.

COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker & Co.; Romer & Skan.*

W. I. C.

WARRING-
TON J.

1913

Nov. 20, 21.

In re CRAVEN.

WATSON *v.* CRAVEN.

[1912 C. 3534.]

Will—Construction—Trust for Conversion—Power to postpone—Shares in Residue—Advances in Lifetime of Testator — Subsequent Advances by Trustees—Hotchpot—Difficulty of realizing Estate—Principle of ascertaining Income pending Distribution—Appropriation in Specie—Unauthorized Investments—Settled Shares—Jurisdiction of Court.

Testator by his will devised and bequeathed his residuary real and personal estate to three trustees, two of whom were his sons, upon trust to sell and convert and to stand possessed of the proceeds upon trust for all his children, except his son J. A., in equal shares, and he directed that all properties and investments acquired by him in the names of any of his children or advances to or for the benefit of his children should be treated as absolute gifts to such children of the properties, investments, and advances which might be taken in their names individually or given to or for their benefit, and that such children should not be liable to repay to him or his estate the consideration which he had paid for the properties or the amounts that might have been advanced or invested on such securities or otherwise. He further directed that in the division of his estate his trustees should equalize his children's shares as far as possible by treating all gifts to them as having been made in satisfaction or part satisfaction of their shares. The testator then settled the shares of his daughters, and declared that his trustees might postpone the sale and conversion of his real and personal estate for so long as they should think fit, the income of the unconverted property to go to the persons to whom the income produced by the sale and conversion would for the time being be payable if the sale and conversion had been actually made. The investment clause did not authorize the investment in the shares of private companies. The testator died in December, 1892, leaving six children other than J. A., who took no interest in the residue, namely, two sons and four daughters. A considerable part of the testator's estate consisted of shares in a private company called Cravens Limited, the articles of which contained restrictive provisions with reference to the transfer of shares. There was no market for these shares, and the trustees, although they had advertised, had been unable to obtain an offer for them. During his lifetime the testator had made advances to certain of his children, and subsequently to his death the trustees had made further advances to two of his sons. The trustees had, for the purpose of dividing the income, pending the distribution of the estate, added to the income of the actual estate interest at 4 per cent. per annum on the advances to the children, and had then divided the total thus ascertained

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into six equal shares, and had paid one of such shares to each of the children, deducting in the case of an advanced child 4 per cent. on the amount of the advances to that child:—

Held, that having regard to the difficulty of realizing the Craven shares the principle adopted by the trustees with regard to the advances made both before and after the death of the testator was the correct one.

In re Poyser [1908] 1 Ch. 828, followed.

In re Hargreaves (1903) 88 L. T. 100, explained and distinguished.

Held, also, that the power to postpone conversion applied to the Craven shares only so long as the estate was retained by the trustees as a whole, and did not extend to authorize them to appropriate those shares to the settled shares of the daughters when the estate was divided.

In re Beverly [1901] 1 Ch. 681, 688, followed.

In re Brooks (1897) 76 L. T. 771, and *Fraser* v. *Murdoch* (1881) 6 App. Cas. 855, distinguished.

ADJOURNED SUMMONS.

John Craven, by his will dated November 22, 1892, appointed his sons Thomas Fewsdale Craven and Ernest Craven and John Pearson Atkinson executors and trustees thereof, and after bequeathing certain pecuniary legacies he devised and bequeathed his residuary real and personal estate to his trustees upon trust to sell and convert and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies and to invest a sum of 1700*l.* and apply the income thereof for the benefit of his son John Arthur Craven during his life in manner therein mentioned and to stand possessed of the residue of the proceeds upon trust for all his children, except John Arthur Craven, who being a son or sons had attained or should attain the age of twenty-one years, or being a daughter or daughters had attained or should attain that age or should marry, to be equally divided between them in equal shares. And the testator directed that all properties and investments acquired by him in the names of any of his children or advances to or for the benefit of his children should be treated as absolute gifts to such children of the properties, investments, and advances which might be taken in their names individually or given to or for their benefit, and that such children should not be liable to repay him or his estate the consideration which he might have paid for such properties or the amounts that might have been advanced or invested on such securities or otherwise. He further directed

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that in the division of his estate his trustees should equalize his children's shares as far as possible by treating all gifts to them as having been made in satisfaction or part satisfaction of their shares. The testator then settled the shares of his daughters, and declared that his trustees might postpone the sale and conversion of his real and personal estate for so long as they thought fit, and that the income of the unconverted property should be paid to the persons to whom the income produced by the sale and conversion would for the time being be payable if the sale and conversion had been actually made. The will contained an investment clause, which did not, however, authorize the trustees to invest in shares of private companies.

The testator died on December 3, 1892, leaving six children other than John Arthur Craven, namely, Thomas Fewsdale Craven, Ernest Craven, Elizabeth Whittington Craven, Edith Mary Speed, Sarah Ellen Le Bas, and Kathleen Frances Watson, all of whom had attained twenty-one years.

A considerable part of the testator's estate consisted of shares in a private company called Cravens Limited, which was incorporated in 1891 for the purpose of taking over the business of a firm of Craven Brothers & Co. in which the testator and his family were interested.

Without taking into account the above shares the value of the residuary estate of the testator on December 31, 1893 (being one year after his death), after paying or providing for his debts and funeral and testamentary expenses and the legacies bequeathed by the will, was 16,531*l.* 9*s.* 2*d.*

At his death the testator's holding in Cravens Limited was 313 "A" shares, which were fully-paid preference shares of 50*l.* each carrying a preferential cumulative dividend of 5 per cent. and representing at par 15,650*l.*, and 23,900 "B" shares of 1*l.* each with 16*s.* paid up, representing at par 19,120*l.* The articles of association of the company imposed restrictions on the transfer of shares which rendered it impossible for a shareholder to sell the shares to an outsider until they had been offered to the company for disposal at a fair price to be fixed by the president of the Sheffield Chamber of Commerce. The trustees were therefore unable to determine the value of the shares and especially of the "B" shares or to realize them to advantage. These "B" shares which were formerly 50*l.* shares with 40*l.* paid up were now 1*l.* shares fully paid up, the last call thereon having been paid in 1910. The dividends on the "A" shares had always been regularly paid, but the dividends on the "B" shares had varied greatly in amount from time to time, though on the whole the company had been very prosperous. The trustees had advertised for offers for these shares, but had received none.

During his lifetime the testator had made the following advances to his children:—Thomas Fewsdale Craven, 1040*l.*; Ernest Craven, 3688*l.* 3*s.* 4*d.*; Elizabeth Whittington Craven, 1048*l.* 12*s.* 9*d.*; Edith Mary Speed, 1644*l.* 11*s.* 10*d.*; and Sarah Ellen Le Bas, 898*l.*

Subsequently to his death Thomas Fewsdale Craven and Ernest Craven had paid to themselves out of the testator's residuary estate the following sums, namely, Ernest Craven, 1500*l.* on February 7, 1893; Thomas Fewsdale Craven, 1500*l.* on February 8, 1893, and 1500*l.* on March 22, 1898.

John Pearson Atkinson died on September 2, 1903.

Thomas Fewsdale Craven died on April 7, 1912, having by his will appointed Sarah Craven and Arthur Fewsdale Craven executors thereof.

The trustees had, in their periodical accounts, for the purpose of dividing the income, added to the income of the actual estate interest at 4 per cent. per annum on the advances made either by the testator or the trustees to the children and had then divided the total thus ascertained into six equal shares, and had paid one of such shares to each child, deducting in the case of each advanced child 4 per cent. on the amount of the advances to that child.

Kathleen Frances Watson was an infant at the testator's death, and was the only child of the testator who had not received an advance. She attained twenty-one in 1898, and married in 1903. In 1912 she for the first time objected to the principle adopted by the trustees and contended that they ought to have followed the principle laid down by the Court of Appeal in *In re Hargreaves.* (1) She accordingly took out an originating summons for the determination (inter alia) of the questions and the relief following: (1.) whether upon the true construction of the will the advances made by the testator in his lifetime to Thomas Fewsdale Craven and the defendants Ernest Craven, Elizabeth Whittington Craven, Edith Mary Speed, and Sarah Ellen Le Bas respectively ought to be treated in the division of the testator's residuary estate as part of their respective shares of the residuary estate already received by them, or how otherwise such advances ought to be treated; (2.) that directions might be given as to how the testator's residuary estate ought to be divided and as to how the income thereof ought as from the date of the testator's death to have been divided having regard (*a*) to the advances made by the testator as aforesaid and (*b*) to any sums of money or portions of the residuary estate received by or advanced to any of the persons beneficially entitled to share in such residuary estate since the death of the testator; and (3.) whether the trustees had power to appropriate the shares in Cravens Limited in or towards satisfaction of the shares of the testator's children whether settled or unsettled in the testator's estate.

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(1) 88 L. T. 100.

Younger, K.C., and *Roope Reeve*, for the plaintiff. The trustees have not adopted the correct principle of dividing the income of the testator's residuary estate. They ought to have valued the estate as at the date of his death, or at latest a year after, and to have deducted the advances made to the children from their respective shares, and then to have divided the income among them in proportion to their aliquot shares in accordance with the principle laid down by the Court of Appeal in *In re Hargreaves.* (1)

[WARRINGTON J. The decision in that case proceeded on the footing that there was there no difficulty in ascertaining the true value of the estate at the death of the testator.]

The value of the Craven shares in the present case could have been ascertained exactly by the method prescribed by the articles of the company. On the true construction of the will it is submitted that the testator contemplated a division of his estate once and for all at his death, or at the latest a year after. *In re Hargreaves* (1) was followed by Neville J. in *In re Gilbert.* (2)

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(1) 88 L. T. 100.

(2) [1908] W. N. 63.

The Court will not direct the computation of interest on advances instead of actual division of the estate unless compelled to do so. To do so in the present case would inflict a hardship on the unadvanced children, as it would enable the advanced children by merely paying 4 per cent. on their advances to claim a full share of the dividends on the Craven shares, which in some years have been very large. The decision in *In re Poyser* (1), in which the computation of interest on advances was directed, proceeded on the basis that the testator had there directed interest at 4 per cent. on advances to be charged after his death. There is no such direction in this case.

Further, the trustees were not justified in treating advances made by them to themselves as merely carrying interest at 4 per cent. They must take these advances in part satisfaction of their shares. The principle of *In re Hargreaves* (2) applies to these advances also.

[WARRINGTON J. The moneys advanced to the trustees would not have brought in more than 4 per cent. to the estate if they had been invested in accordance with the trusts of the will.]

The advances made by the testator stand on a different footing to those made by the trustees to themselves.

[WARRINGTON J. There would still be the same difficulty as to not being able to ascertain the value of the Craven shares.]

The trustees having wrongly dealt with the income of the trust property, the plaintiff is not bound by the accounts which she signed. The Court will adjust these accounts as between the parties entitled, and lapse of time will not constitute a bar to relief: *In re Robinson* (3); *In re Horne.* (4) In *In re Hargreaves* (2) there was no suggestion made that lapse of time prevented an adjustment of the accounts being made.

We leave it to counsel for the defendants to open the last question of the summons, which was inserted at their instance, namely, as to the appropriation of the Craven shares to the settled shares of the daughters.

Upjohn, K.C., and *Alfred Adams*, for Ernest Craven. The principle adopted by the trustees was correct: *In re Rees* (1); *In re Poyser.* (2) It would have been impossible to apply the principle laid down in *In re Hargreaves* (3) to a case like the present, where the value in money of the estate could not be ascertained either at the death of the testator or at the expiration of a year afterwards. The only value which could have been put on the Craven shares would have been their par value, which would have afforded no criterion of their true value. The note of *In re Hargreaves* in the *Weekly Notes* (4) shews the reason why that case did not find its way into the *Law Reports.* That case is distinguishable from the present case on the ground that the trust there was not an imperative trust for conversion, but a trust to divide an unconverted estate into shares. There is a difference between the income of an entire estate unconverted and the income of a share of a converted estate.

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(1) [1908] 1 Ch. 828.

(2) 88 L. T. 100.

(3) [1911] 1 Ch. 502, 508.

(4) [1905] 1 Ch. 76.

There are three answers to the plaintiff's claim: (1.) On the construction of the will there is no share producing income until there is an actual division of the estate; (2.) whatever the construction of the will may be, there could not in the circumstances of the case have been a division into shares either notionally or otherwise; and (3.) on the footing on which the plaintiff is claiming, her share is a share in the estate from the death, and that being so, the trusts of the will do not allow the trustees to retain these Craven shares as part of her share. If, therefore, she succeeds she will only be entitled to 4 per cent. on the value of her interest in these Craven shares and will have to refund the balance of the income she has received in respect of them.

[WARRINGTON J. On the main question in the case I will not trouble you further.]

The same principle as is applicable to the advances by the testator applies to the advances by the trustees to themselves.

Then as to the power of the trustees to appropriate the Craven shares to the settled shares of the daughters, the power is one which relates to the entirety of the testator's estate and does not apply to a severed share. The will contains no power to make

(1) (1881) 17 Ch. D. 701.
(2) [1908] 1 Ch. 828.
(3) 88 L. T. 100.
(4) [1903] W. N. 24, 28.

any allocation in specie. The mere power to retain for the purposes of management does not make the Craven shares authorized investments for the purposes of the investment of the separate shares.

[WARRINGTON J. referred to *In re Smith.* (1)]

There is no express power in the will to allocate these shares to the settled shares. That being so, they cannot, inasmuch as they do not fall within the investment clause, be appropriated to the settled shares: *In re Beverly.* (2)

Dighton Pollock, for the legal personal representatives of Thomas Fewsdale Craven, and *Hon. Frank Russell, K.C.*, and *P. F. Stokes*, for the defendants Elizabeth W. Craven, Edith M. Speed, Sarah E. Le Bas, and the infant defendants, adopted the same arguments.

Younger, K.C., in reply. Although the investment clause does not authorize the investment in these Craven shares, yet the power to postpone conversion is, it is submitted, sufficiently wide to authorize their retention for the purposes of the settled shares: *In re Brooks* (3); *In re Cooke's Settlement.* (4) In *In re Beverly* (2) the only question was whether the shares in question were authorized investments.

[*Upjohn, K.C.*, referred to *Fraser* v. *Murdoch.* (5)

WARRINGTON J. There does seem to be a distinction between a power to retain investments which makes them authorized investments for the time being and a power to postpone conversion.]

A power to postpone conversion coupled with a direction for the application of the income is equivalent to a power to retain without that direction.

Upjohn, K.C., in reply on the last question, referred to *Brown* v. *Gellatly.* (6)

WARRINGTON J. The main question in this case is in what way the income of the testator's estate ought to be divided between his children, having regard to the fact that some of them have received advances and others have not. Speaking generally—I will go to the will directly—the duty of the trustees is to divide the income amongst the children in equal shares. For the purpose of effecting that division, the trustees have hitherto added to the income of the actual estate interest at 4 per cent. upon advances which have been made to certain children of the testator. They have then divided the total thus ascertained into equal shares, and have paid over to each advanced child the share, less, of course, interest at 4 per cent. on that particular child's advances. The plaintiff says that that is wrong, and that the trustees ought, at the death of the testator or at the latest a year after his death, to have ascertained the value of the testator's estate in money and the value of each share in the estate, also in money, treating the amount of the advances as part of the share of the child advanced, and then to have divided the income of the actual estate in proportion to the value so ascertained of the several shares exclusive of so much thereof respectively as is represented by advances. Those were the rival contentions, and the plaintiff's proposition really amounts to this, that it was the duty of the trustees at the testator's death, or at latest a year after his death, actually to divide the estate, and, having regard of course to the advances, pay to each child the income of the separate share falling to him or her on division. I have to decide whether that is the true view and the duty of the trustees under this will, having regard to the nature of the estate which they were administering, or whether they have not taken the correct view, namely, that until the physical division of the estate could take place they were justified in treating the income of the estate as a whole and dividing that, after, of course, bringing into account the interest on advances in the way they have done.

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(1) [1896] 2 Ch. 590.

(2) [1901] 1 Ch. 681, 688.

(3) 76 L. T. 771.

(4) [1913] W. N. 284; since reported in [1913] 2 Ch. 661.

(5) 6 App. Cas. 855, 877.

(6) (1867) L. R. 2 Ch. 751.

Now, the testator died on December 3, 1892. He was, at his death, a large shareholder in a company called Cravens Limited, which was a private company incorporated in the year 1891 for the purpose of taking over the business of a firm in which the testator and other members of his family were interested. The articles of association of the company provided, as is not uncommon in such cases, that shareholders should not have unlimited powers of transfer; but the powers of transfer were considerably restricted, and, in particular, means were provided whereby, if a shareholder desired to sell his shares and the company was unwilling to accept the purchaser, the company itself might find a purchaser and sell the shares at a price to be fixed in the manner provided for by the articles. I only refer to that because the result is that those shares were not shares which one could go into the market and sell at a certain ascertained market price, as one could Consols or railway stock or any other investments which are regularly quoted on the Stock Exchange. They were, in that sense, unmarketable securities, and not only that, but it might have been extremely difficult to ascertain, with any real satisfaction, what was the value of those shares. Those shares formed a very considerable part of the testator's estate. Taking them at their par value, 313 "A" or preference shares of 50*l.* each fully paid came to 15,650*l.*, and 23,900 "B" shares of 1*l.* each with 16*s.* paid came to 19,120*l.*, the whole estate coming to a little over 51,000*l.*; so that they formed a very considerable part of the estate with which the trustees had to deal. The testator had seven children, namely, four daughters and three sons, of whom six only were interested in his residuary estate. He made his will shortly before his death, on November 22, 1892, after the formation of the company and at a time when he was possessed of the shares which I have just mentioned. The will, so far as it is material, is as follows: the testator gave all his real and personal estate to three trustees, two of whom were his sons, upon trust to sell—I need not read the details of that—and then they were to stand possessed, after paying his debts and making provision for certain legacies, "of the residue of the moneys produced by such sale calling in and conversion of my said real and personal estate and of my ready money In trust for all my children except my said son John Arthur who being a son or sons have attained or shall attain the age of twenty-one years or being a daughter or daughters have attained or shall attain that age or shall marry to be divided between them in equal shares and if there shall be only one such child the whole to be in trust for that one child."

Pausing there for one moment, that, of course, is the simplest possible provision—a trust to convert, to pay certain moneys out of the proceeds of conversion, and to stand possessed of the residue for the children attaining twenty-one in equal shares. Nothing could be simpler than that. The testator then recites that he has purchased certain properties for some of the children; that he has invested money on mortgage or other securities in the names of certain of his children; that he has made advances for the benefit of certain of his children; and that it is his intention to do the same thing in future, and then proceeds as follows: "I do hereby declare that all such properties and investments so acquired or to be acquired by me in the names of any of my children or advances to or for the benefit of my children are to be treated as absolute gifts to such children of the properties investments and advances which may be taken in their names individually or given to or for their benefit and that such children shall not be liable to repay to me or my estate the consideration which I may have paid for such properties or the amounts that may have been advanced or invested on such securities or otherwise Provided always and I expressly declare and direct that in the division of my estate under the trusts hereinbefore declared my trustees shall equalise my children's shares as far as possible by treating all gifts to my children or to any child of mine in my lifetime as hereinbefore mentioned as having been made in satisfaction or part satisfaction as the case may be of his or her share in my estate and for the purpose of ascertaining the amount of the share of each such child my trustees must take into account not only the value of my estate then available for division but also the sums of money which I have paid for the purchase of any such properties as aforesaid and which I have advanced or invested in such securities or otherwise as aforesaid Provided always and I declare that my trustees or trustee shall retain the share or shares to which any daughter or daughters of mine shall become entitled of and in the residuary trust funds" upon certain trusts—trusts to pay the income to each daughter for life and after death for her children and so on—the ordinary trusts to settle the daughters' shares.

Then the testator proceeds to declare that the trustees "may postpone the sale and conversion of my real and personal estate or any part thereof for so long as they or he shall think fit and that the rents and profits and income to accrue from and after my decease of and from such part of my real and personal estate as shall for the time being remain unsold and unconverted shall after payment thereout of all incidental expenses and outgoings be paid and applied to the person or persons and in the manner to whom and in which the income of the moneys produced by such sale or conversion would for the time being be payable or applicable under this my will if such sale and conversion had been actually made." Then come a power to the trustees to let any hereditaments, and a direction that moneys liable to be invested may be invested in certain stocks and securities enumerated in a list which does not include such shares as those held by the testator in Cravens Limited.

The question then arises, Was it the duty of the trustees actually to divide this estate, or—which comes to the same thing—treat it as divided into as many shares as there were children on the death of the testator, or at the latest a year after his death, when presumably his debts had all been paid and the estate was clear? In my judgment it was not. I think, first on the construction of the will itself, that although the trust is one for the children in equal shares, it is a trust of the whole of the proceeds of conversion. Of course, if the estate had been actually converted and was in the shape of money, there would have been nothing to prevent the trustees from dividing it, and they would have been doing their duty by so dividing it; but I do not think when you take into account the power to postpone conversion with its attendant direction as to income—which has no reference to the mode in which the income of individual shares is paid, but merely refers to the mode in which the income of the entire estate is to be applied—you can say that on this will and having regard to the nature of the property with which the trustees had to deal, namely, the shares which were not readily capable of valuation, it was their duty at the moment of the death or at the expiration of a year after the death to treat this estate as divided. There would in my judgment have been, or in certain events might have been, a great and a just cause of complaint on the part of the cestuis que trust if the trustees had had a valuation made of these Craven shares and treated the estate as divided on the footing of that valuation. It might have been favourable to some and unfavourable to others, but I think it would have been open to any person interested in the estate to say: " You ought not to have had these shares valued. If you are going to retain them you ought to retain them as part of the whole estate as an undivided whole, and to deal with the income arising from that estate as an undivided whole, and not as divided into a number of separate shares, dealing with the income as the income arising from separate shares." Now, the trustees have taken a course which seems to me the least open to objection. They have ascertained, by the means which I have mentioned, the income of the entire estate, and have then divided that income according to the trusts of the will.

It seems to me that that is the right course for them to take in this case. But then it is said that I am bound to take the opposite view by reason of the decision of the Court of Appeal in *In re Hargreaves.* (1) But in that case there existed a circumstance which is absent in the present case, namely, that there was there no difficulty whatever in ascertaining the cash value of the estate as at the death of the testator, or, at all events, at the expiration of the year. Romer L.J., who gives what I may call the leading judgment in that case, because it is he who explains at length the reasons for the decision, says that " no one says here that it is not possible to ascertain exactly what was the value of the estate at the death. Then the value of the estate at the death being known, and the amounts of the advances, the value in money of each child's share is accurately ascertained, and then it can be found exactly, in respect to an advanced child, how much of his share is made up from his advances, and how much is made up out of the estate." It is that which the plaintiff wishes me to do here. She wishes me to say here that each share ought at the death to be ascertained, so as to find, in respect of the advanced child, how much of the share is made up from advances and how much is made up from the actual estate. As

(1) 88 L. T. 100.

I have already explained, it is that which I do not think I could do in the present case, and it was the fact that that could be done in *In re Hargreaves* (1), which was, in my opinion, the determining factor in the judgment which the Court of Appeal there pronounced. The Court of Appeal in effect there said, "You do not resort to the device of charging interest on advances unless it is necessary to do so," and they further said that it was not necessary to do so in that case, and that therefore that device should not have been resorted to. But in the case before me, I think it is necessary to do so. I do not see how it is possible—in the words of Romer L.J.—to ascertain the value in money of each child's share as at the testator's death, and unless that can be done the method adopted in *In re Hargreaves* (1) cannot be applied. I think, therefore, that I am justified in saying that *In re Hargreaves* (1) is not the case with which I have to deal, and that the opinion I am expressing is not contrary to any opinion expressed or anything done in that case. I must hold, therefore, on the main part of the case, that what the trustees have done was the right thing to do.

Now, there is one comparatively small matter to which I must refer, which is this. The testator, as I have said, made advances to some of his children, in one form or another, during his lifetime. But, in addition to that, the trustees have advanced to two of the testator's sons, who were also two of the trustees, certain sums on account of their shares—I think it was two sums of 1500*l.* each in the case of one son, and another sum of 1500*l.* in the case of another son—and have dealt with them on the same footing as the sums advanced by the testator; that is to say, they have added to the actual income of the estate interest at 4 per cent. on these advances. It is said that, so far at all events as those sums are concerned, the principle for which the plaintiff contends as that on which the trustees ought to have acted in reference to the advances by the testator ought to be acted on with reference to these sums. I do not see that. Those sums advanced were sums of money forming part of the testator's estate, and, instead of investing them, the trustees paid them to the sons in part satisfaction of their shares. It is not suggested that the testator's estate could have obtained more income than the 4 per cent. interest paid by the sons. The capital is safe because their shares are more than enough to satisfy the advances, and I cannot see how anybody interested in the testator's estate can have been harmed by the dealing with those sums in the way they have been dealt with, namely, by giving to the estate the utmost income which could have been obtained from the sums if they had been invested pursuant to the directions of the testator's will. It seems to me that the trustees were right in dealing with those sums in the way they have, namely, by charging the sons who received those advances with interest at 4 per cent. on the amounts.

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(1) 88 L. T. 100.

Now comes another point, which is one of some difficulty. I have not referred to it before, because I rather desired to deal with it separately, although the opinion which I have formed with regard to it has a considerable bearing on the conclusion to which I have come in reference to the main points of the case. That point is on the last question in the summons, whether the trustees can appropriate these shares in Cravens Limited to the settled shares of the daughters. Now the point is that the trust for investment which is applicable to the settled shares of the daughters does not extend to shares such as these. Have the trustees power to hold, as part of the settled shares, these unauthorized investments? Now, the first expression of opinion of the Court on this question which has been referred to is that of Buckley J. in *In re Beverly.* (1) He there says: "Under those circumstances it seems to me that the executors and trustees of this will have power to appropriate these particular portions of the estate towards satisfaction of these shares. That answers the first question upon the summons which is addressed to the three shares of Euphemia, Grace, and Emily, who take absolutely. They have power to consent to the appropriation, and if they do consent — well and good. But the second question relates to the three ninth shares which are settled. As to these a different principle comes in. The trustees of the settled shares can only consent to take—in satisfaction of what is given to them—such investments as are authorized by the instrument which creates the settlement. This will contains certain clauses as to investment, and there cannot, I apprehend, be appropriated to those three ninth shares any investments which do not fall within the scope of the investments allowed by the will. Subject to that, I think appropriation may be made under the settlement." Now, if the line of authority stood there, there could, I think, be no doubt but that I must answer this question in the negative, namely, that the trustees have no power to appropriate the Craven shares to the daughters' settled shares. But it is said that that decision is not consistent with the previous decisions—one in this Court of *In re Brooks* (1) and the other in the House of Lords of *Fraser* v. *Murdoch.* (2) Before, however, I look at those cases, I must just remind myself that the provisions of the will which are applicable to these Craven shares are, first, a provision to convert absolutely, and, secondly, a discretionary power to postpone. That is the kind of direction with which I have to deal. Now, in *In re Brooks* (1), which was before Stirling J., the testator gave specific property upon trust to sell and invest the proceeds, and set apart portions to answer settled legacies, and he gave power to the trustees "to continue all or any part of my personal estate in the state or upon the investments in or upon which the same shall be placed at the time of my decease, or otherwise to call in and compel payment, or sell and dispose of the same, and to lay out and invest the moneys to be thereby raised" in certain specified securities. The directions to invest in respect of the settled shares were to "invest in or upon such stocks, funds, or securities as hereinafter mentioned." I think I am accurately stating the result of the judgment of Stirling J. when I say that the conclusion at which he arrived was that in that will the direction to continue investments made them authorized investments and was equivalent to a power to invest moneys therein, and, further, that those investments were included in the "stocks, funds or securities as hereinafter mentioned" in the directions with regard to the investment of the settled shares, and that on that ground he came to the conclusion that the trustees had power to make the appropriation which they were proposing to make in that case to the settled shares.

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(1) [1901] 1 Ch. 681, 688.

(1) 76 L. T. 771, 772.

(2) 6 App. Cas. 855.

I think that is the ground of the decision, and it certainly is the ground of the decision in the other case of *Fraser* v. *Murdoch* (1), in which Lord Watson actually contrasts the case which I have with the case which was before him, because in referring to the decision of Lord Gifford in that case, which was a Scottish case, and Lord Gifford was the judge in the Court below who decided it, he says this: "His Lordship held that this was not a continuing power applicable to all the purposes of the trust, but merely a power to delay realization, and consequently to postpone the distribution of the residue. I am unable to adopt that view. A general power to retain stocks in which the testatrix has already invested does not differ, in its scope, from a general power to invest in these stocks." In the present case what I have is just the very thing which Lord Watson says he had not in the case before him. What I have here is an absolute trust to convert, followed by a power to delay realization and, consequently, to postpone the actual distribution of the residue. It is not a power to the trustees to retain investments which would go on through the whole continuance of their trust, but only a power, at their discretion, to postpone the realization of investments which for the time being they thought it undesirable to convert. I think the present case falls within the statement of the law made by Buckley J. in *In re Beverly* (2), and I must hold therefore—though I do so with some reluctance—that the trustees have no power to appropriate these shares to the settled shares.

The order will be, following the terms of the first alternative of the question in the summons in *In re Poyser* (3) with the necessary adaptation: "Declare that for the purpose of the division of the actual income of the testator's residuary estate pending the division thereof interest at 4 per cent. per annum from the testator's death or from the date of payment thereof (as the case may be) on the sums by the said will directed to be taken into account and on the sums since advanced by the trustees to either of themselves ought to be added for computation to the actual income of the estate for the time being and the aggregate amount of income so arrived at ought to be divided into equal sixth shares and paid to the beneficiaries subject as to the income of the shares against which any sums are directed to be debited to the deduction of interest at that rate on such sums respectively." As regards the last question of the summons as to appropriation the answer will be in the negative.

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(1) 6 App. Cas. 855, 877.

(2) [1901] 1 Ch. 681, 688.

(3) [1908] 1 Ch. 828, 832.

Solicitors: *J. Henry Sturgess, for Claude Barker, Sheffield; Bell, Brodrick & Gray, for Rodgers & Co., Sheffield; Tapp, Blackmore & Weston.*

W. I. C.

In re JEFFERY.
NUSSEY *v.* JEFFERY.

[1913 J. 972.]

WARRINGTON J.
1913
Nov. 25.

Will—Latent Ambiguity—Gift to Husband and Wife and "their daughter"—Five Daughters—Extrinsic Evidence as to which Daughter was meant—Division into Three Shares.

Testatrix gave her residuary personal estate "between my brother W. J. his wife and their daughter." She died in 1913, leaving her surviving W. J. his wife, and five daughters of W. J. and his wife, of whom Phœbe was one. W. J. and his wife were married in 1873.

Evidence was adduced to the effect that the testatrix was on extremely intimate terms with Phœbe alone, and that by a former revoked will made in 1909 the testatrix gave her residue to be equally divided between her brother W. J. and "his daughter Phœbe";—

Held, that evidence of intention was admissible for the purpose of shewing which of the five daughters was intended, but that treating the evidence as evidence of surrounding circumstances only it was sufficient to shew that Phœbe was the daughter referred to by the testatrix.

Held, also, that on the true construction of the will the residue was divisible in equal third shares, W. J. and his wife taking separately and not as one person.

In re Dixon (1889) 42 Ch. D. 306, followed.

In re Jupp (1888) 39 Ch. D. 148, discussed.

ADJOURNED SUMMONS.

Testatrix, who died in 1913, by her will made in August, 1912, gave her residuary personal estate "between my brother

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Walter Jeffery his wife and their daughter." The testatrix left her surviving Walter Jeffery and his wife, who were married in 1873, and also five daughters of Walter Jeffery and his wife, of whom Phœbe Winifred, who was born in 1879, was one.

This was an originating summons taken out by the executor for the determination (inter alia) of the question who were entitled under the residuary bequest and in what shares and proportions.

Evidence, which is referred to in the judgment, was adduced to the effect that the testatrix was on extremely intimate terms with Phœbe Winifred alone of the five daughters, and that by a former revoked will made in 1909 the testatrix gave her residue to be equally divided between her brother Walter Jeffery and "his daughter Phœbe."

G. M. Hildyard, for the executor.

G. D. Johnston, for Phœbe Winifred. This is a case of equivocation or latent ambiguity in which evidence of intention is admissible, but treating the evidence as evidence of surrounding circumstances merely it is amply sufficient to shew that Phœbe Winifred was the daughter intended by the testatrix. Extrinsic evidence is admissible for the purpose of shewing reasons for preferring one daughter to another: Jarman on Wills, 6th ed. vol. i. pp. 471, 525; *In re Feltham's Trusts* (1); *Reynolds* v. *Whelan* (2); *Doe* v. *Hiscocks.* (3)

P. T. Carden, for the next of kin. The gift so far as the daughter is concerned fails for uncertainty. Extrinsic evidence can be used only for the purpose of shewing which daughter the testatrix intended to benefit, not which daughter she was likely to intend to benefit, and the evidence in the present case does not go to the necessary length: Wigram on Extrinsic Evidence, proposition vii.; *In re Mayo* (4); *In re Ofner* (5); *In re Feltham's Trusts* (1); *Drake* v. *Drake.* (6) The former will is admissible not because it was a will but notwithstanding that it was a will, and cannot be used as evidence of intention: per Farwell L.J. in *In re Ofner*.(1)

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(1) (1855) 1 K. & J. 528.

(2) (1847) 16 L. J. (Ch.) 434.

(3) (1839 5 M. & W. 363, 368.

(4) [1901] 1 Ch. 404.

(5) [1909] 1 Ch. 60.

(6) (1860) 8 H. L. C. 172, 181.

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JEFFERY, *In re.* NUSSEY *v.* JEFFERY.

WARRINGTON J. The testatrix in this case left the residue of her estate to be divided between her brother Walter Jeffery his wife and their daughter. On the face of those words there would be no difficulty in saying that a share, whatever it may be, in the estate was given to the person who fulfilled the description of the daughter of Walter Jeffery and his wife. But evidence which is plainly admissible, being evidence of surrounding circumstances, shews that there were several daughters of Walter Jeffery and his wife. That evidence therefore raises what is sometimes called a latent ambiguity, namely, which of several persons answering the description of a daughter of Walter Jeffery and his wife is intended by the testatrix under the description of "their daughter." The case is one in which evidence of intention as distinct from evidence merely of surrounding circumstances is admissible, and in the present case I have evidence both of intention and of surrounding circumstances. As to some of the evidence it is a little difficult to say whether it is to be regarded as evidence of intention or whether it is properly regarded as evidence of circumstances which may be taken to have been in the mind of the testatrix when she made her will. The evidence consists of these facts: that the testatrix's brother Walter Jeffery and his wife had a daughter named Phœbe Winifred; that the testatrix was on terms of peculiar intimacy with Phœbe Winifred as distinguished from the other daughters of Walter Jeffery and his wife—by peculiar intimacy I mean an intimacy which distinguished her relations towards Phœbe Winifred from her relations towards the other daughters. For instance, she had desired Phœbe Winifred to reside permanently with her and to accompany her to Australia when she herself went there for a time; and she wrote constantly to Phœbe Winifred and only very occasionally to any of the other daughters, and letters have been produced to me which shew the extremely intimate terms on which the testatrix was with regard to Phœbe Winifred; while there is no evidence of any such relation having existed between the testatrix and any other daughter. That evidence by itself certainly convinces me that when the testatrix uses the expression "their daughter" she could only have been using the expression as referring to the daughter whom, as I know from the evidence to which I have referred, she had selected as her particularly intimate friend. It is inconceivable to my mind that by the words she had used the testatrix could have been referring to anybody except Phœbe Winifred. So far as that evidence is concerned it is evidence to shew not what the testatrix intended but what is the meaning of the words which she has used as applied to the surrounding circumstances, and that being so, that evidence really concludes the case, because on that alone I find that by the expression "their daughter" the testatrix must be taken to have meant their daughter Phœbe Winifred. But evidence of rather a different nature has been adduced which may be regarded either as evidence of intention or as evidence of what the testatrix meant by the expression "their daughter." That evidence consists of a previous will made in 1909 whereby the testatrix left the residue of her estate to be divided equally between her brother Walter Jeffery and his daughter Phœbe, using in that solemn document the proper christian name of the person to whom she was referring as the daughter of her brother. I think on the whole that this previous will is admissible for this reason, namely, that when the testatrix in a subsequent will referred to "their daughter" in the singular and it is necessary to find out which daughter she meant, the previous will shews that the only person in that solemn document described as "their daughter" was Phœbe Winifred, and then when I come to the second will and find the expression "their daughter" the conclusion is almost irresistible that by that expression she meant the daughter whom she had previously described in the former will by her christian name. I hold therefore that the expression "their daughter" refers to their daughter Phœbe Winifred.

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(1) [1909] 1 Ch. 68.

The question was then argued in what shares and proportions Walter Jeffery, his wife and Phœbe Winifred, became entitled.

G. D. Johnston, for Phœbe Winifred. The husband and wife take one half-share between them and Phœbe Winifred the other half-share : *Gordon* v. *Whieldon* (1) ; *In re March* (2) ; *In re Jupp.* (3) The question is one of law rather than of construction, resting on the doctrine that husband and wife are one person in law, and is not affected by the Married Women's Property Act, 1882.

P. T. Carden, for Walter Jeffery and his wife. The question is one of construction, and so far as the question of construction is concerned the decision of Kay J. in *In re Jupp* (3) is hardly consistent with the subsequent decision of North J. in *In re Dixon* (4), where the learned judge points out that notwithstanding the rule of English law that a gift to a man, his wife and a third person, is to be construed as a gift of one moiety to the husband and wife and of the other moiety to the third person, a very little indication to the contrary is sufficient to lead to an opposite construction. The language of the present will is the same as the language of the will in that case and shews an intention to divide equally between the three. In *Gordon* v. *Whieldon* (1) there were no words of severance.

Clauson, K.C., and *Owen Thompson*, for other parties.

WARRINGTON J. The question which I have now to decide is whether under the gift to Walter Jeffery, his wife and their daughter, the husband, wife, and their daughter take in equal third shares, or whether the husband and wife take one moiety and the daughter the other moiety. It is said that there is an absolute rule of law that a gift to a person, his wife, and another person is to have the latter construction, namely, that the husband and wife are to be treated as one person and are to take one moiety, and the third person is to take the other moiety. In my opinion the rule is one really of construction, and that is plainly shewn not only by the judgment of North J. in *In re Dixon* (4), in which he cites a number of cases, but also by some of the judgments referred to by him. He refers in particular to

(1) (1848) 11 Beav. 170.
(2) (1884) 27 Ch. D. 166.
(3) 39 Ch. D. 148.
(4) 42 Ch. D. 306.

a judgment of the Privy Council in *Dias* v. *De Livera* (1), where it is stated: "The rule of English law that a gift to a man and his wife, and to a third person, is to be construed as a gift of a moiety to the husband and wife and a moiety to a third person, is founded on the doctrine of English law that husband and wife are, for most purposes, one person. And yet any indication, however slight, of an intention that each shall take separately has been held to defeat the application of this doctrine." North J. then refers to two cases, *Warrington* v. *Warrington* (2) and *Bricker* v. *Whatley* (3), which illustrate this principle. In my opinion these authorities plainly shew that the question is one of construction though the Court approaches the question with a bias in favour of finding that the husband and wife are to be treated as one person, as for many purposes in English law they are. In the present case I have to determine whether on the true construction of this will the case falls on one side of the line or on the other. The case of *In re Dixon* (4) seems to me to shew where the distinction really lies. If the testator merely enumerates a number of legatees, describing one or more of them as the wife or the husband of the preceding legatee, then all these legatees may be fairly regarded independently as separate persons; but if on the other hand the testator couples the husband and the wife together in such a way as to refer to them jointly as husband and wife, then the ordinary rule applies. Let me now consider on which side of the line the present case falls. The enumeration here is "Walter Jeffery his wife and their daughter." The conjunctive comes not between the husband and the wife, but between the wife and the daughter. I turn to *In re Dixon* (4) and I find that in that case the Court had exactly the same kind of description. The head-note is slightly inaccurate, because it suggests that the word "and" occurred between the names of the husband and wife, but the words of the will according to the report were "William Byram Elizabeth Byram his wife"—without any word of conjunction—"Sarah Byram wife of Henry Richards Jane Byram the wife of George Davis George Dixon Byram Cyrus Carter and Charlotte his wife," the only copulative conjunction coming between the two last names of the series. What North J. really held in that case was that where there is a mere enumeration of persons, some of whom are described as the wives of others previously named, they are intended to take separately, and none the less so because the two last-named persons in the list are united by a conjunctive. In my opinion that view illustrates the class of case in which the Court departs from the general rule, and in the present case I read the words "Walter Jeffery his wife and their daughter" as merely intended to refer to the various persons mentioned in the particular description and not to couple the wife with the husband. The only difficulty which I feel is occasioned by a decision of Kay J. in *In re Jupp* (1), where the testator directed the residue of his estate to be divided into five equal shares, one of which was to be divided "between my sister Mary Buckwell Daniel Buckwell her husband and Harriett Buckwell her step-daughter in equal parts." In that case therefore there was an enumeration of several persons, one of whom was described as the husband of the preceding person without the use of any conjunctive between the names, and Kay J. held that the husband and wife only took one moiety between them. In his judgment the learned judge does not discuss the question whether on the true construction of the will the ordinary rule should or should not be applied, but he assumes that the general rule applies and only deals with the question whether the case was affected by the Married Women's Property Act, 1882. I do not think, therefore, that I am bound by that decision to decide the present case in a way contrary to my own opinion on the true construction of the will, and treating the question as one of construction I hold that the residue is divisible into three equal shares.

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(1) (1879) 5 App. Cas. 123, 135.

(2) (1842) 2 Hare, 54.

(3) (1684) 1 Vern. 233.

(4) 42 Ch. D. 306.

Solicitors: *Flower & Nussey; Surr, Gribble, Nelson & Oliver.*

A. C.

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(1) 39 Ch. D. 148.

SARGANT J.
1913
Nov. 14.

COLONIAL GOLD REEF, LIMITED v. FREE STATE RAND, LIMITED.

[1913 C. 2965.]

Company—Articles of Association—Proxy—Appointment by Corporation—Common Seal—Foreign Company having no Seal—Power of Attorney—Validity—Construction of Articles—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 68.

Articles of association provided that no person should be appointed a proxy who was not a member of the company, and by article 73 that no objection should be made to the validity of any vote except at the meeting or poll at which such vote should be tendered, and every vote not disallowed at such meeting or poll, and whether given personally or by proxy, should be deemed valid for all purposes whatsoever. Proxies had been given to A., who was not a member of the company, and failing him to B., who was a member. A. voted under these proxies and no objection was taken at the time:—

Held, that the validity of these votes could not be afterwards disputed.

A vote given by the representative of a company under a resolution passed pursuant to s. 68 of the Companies (Consolidation) Act, 1908, can be properly admitted by the chairman on the evidence afforded by a copy of such resolution.

Articles of association of an English company provided by article 75 that "the instrument appointing a proxy shall be in writing under the hand of the appointer or his attorney duly authorised in that behalf, or, if such appointer is a corporation, under its common seal." A South African company having no common seal and not required to have one was a shareholder in the English company, and by writing under the hands of two directors appointed an attorney in England to vote on its behalf, with power of substitution. Acting under this power the attorney appointed himself proxy in the form prescribed by the articles and claimed to vote either under the power of attorney or under the proxy. The chairman rejected this vote:—

Held, that the requirement of a common seal in article 75 only applied to corporations having a common seal according to English law, and that the attorney of the South African company was entitled to vote at any rate under the proxy if not under the power of attorney itself.

MOTION.

This was a motion by the plaintiff company and Thomas Alexander Glenny, their attorney, to restrain the defendant company and certain of their directors from excluding three persons from any meeting of directors of the defendant company, or interfering with them in the exercise of their duties as directors.

The question was whether a resolution submitted to the annual general meeting of the defendant company, appointing these three persons as directors, had been properly declared lost, and this depended on whether certain votes had been properly admitted and whether certain other votes had been properly rejected at a poll then taken.

The articles of association of the defendant company provided as follows:—

Article 73. "No objection shall be made to the validity of any vote except at the meeting or poll at which such vote shall be tendered, and every vote not disallowed at such meeting or poll, and whether given personally or by proxy, shall be deemed valid for all purposes whatsoever."

Article 75. "Votes may be given personally or by proxy. The instrument appointing a proxy shall be in writing under the hand of the appointer or his attorney duly authorised in that behalf, or, if such appointer is a corporation, under its common seal. Except that a corporation, being a member, may appoint as proxy any person to act as its representative, no person shall be appointed as a proxy who is not a member of the company and qualified to vote."

Article 80. "Any instrument appointing a proxy shall, as nearly as circumstances will admit, be in the form or to the effect following:—

"FREE STATE RAND LIMITED.

"I of a member of the Free State Rand Limited hereby appoint of or, failing him of (being members of the company) as my proxy, to vote for me and on my behalf at the ordinary or extraordinary (as the case may be) general meeting of the company to be held on the day of 19 and at every adjournment thereof.

"Signed the day of ."

The annual general meeting of the defendant company was held on October 29, 1913. A resolution was proposed for the

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appointment of the three persons as directors, which the chairman, on a show of hands, declared to be lost. Mr. Glenny, supported by two shareholders, demanded a poll, which was immediately taken. At the poll 23,885 votes were given in favour of the resolution and 27,108 votes were given against it, and the resolution was declared lost.

Amongst those voting against the resolution was Lord Churston under proxies which were all in similar form, from shareholders holding 15,983 shares appointing Lord Churston, or failing him John Coutts Duffus, to vote in respect of these shares. Lord Churston though a director was not a member of the defendant company. John Coutts Duffus was a member. Lord Churston voted in respect of these shares and no objection was taken at the time on the ground that he was not a member of the defendant company.

Five thousand shares in the defendant company were held by the South East Africa (1910), Limited, an English company. At the meeting of the defendant company Mr. Cornwallis West, the chairman of the South East Africa (1910), Limited, produced a writing purporting to be a resolution passed by that company appointing him its representative under the Companies (Consolidation) Act, 1908, s. 68, to vote at the annual general meeting of the defendant company. This writing was signed by himself as chairman and by the secretary of the South East Africa (1910), Limited, but was unsealed and unstamped. The chairman of the defendant company admitted these 5000 votes against the resolution.

A large number of shares in the defendant company was also held by the plaintiff company, which was a company duly registered under the limited liability laws of the Orange River Province of the Union of South Africa and having its head offices in Johannesburg. This company had no common seal, and was not required by the South African law to have any.

Mr. Thomas Alexander Glenny, who was himself a shareholder in the defendant company, held a power of attorney from the plaintiff company empowering him to vote in respect of these shares, and acting under the power of attorney he had also expressly appointed in the form prescribed by the articles himself, or failing himself another shareholder, to act as proxy for the plaintiff company and vote at the annual meeting. The chairman of the defendant company, however, rejected these votes on the ground that the power of attorney and proxy did not comply with the requirements of the articles of association of the defendant company.

The power of attorney was as follows: "We the undersigned Adolph Plinke and James Beatty, both of Johannesburg, Transvaal Province of the Union of South Africa, in our capacity of two of the directors of Colonial Gold Reefs Limited, a company duly registered under the Limited Liability Laws of the Orange River Province of the Union of South Africa, and having its head offices at Johannesburg aforesaid (hereinafter called the company), do hereby nominate, constitute and appoint Thomas Alexander Glenny, company director of Johannesburg aforesaid but presently in London, England, with power of substitution to be the company's true and lawful attorney and agent in the company's name, place and stead to . . . . (*c*) vote for the company and on the company's behalf at the meetings of shareholders of Free State Rand Limited on all matters submitted to the shareholders . . . . and generally for effecting the purposes aforesaid to do or cause to be done whatever shall be requisite as fully and effectually to all intents and purposes as we might or would do if personally present and acting therein . . . .

"Given under our hands in Johannesburg this ninth day of October, 1911, in the presence of the undersigned witnesses."

This document was signed by the two directors and by the secretary of the company before two witnesses and before the assistant resident magistrate, Johannesburg, whose official seal was affixed, and had been registered at the office of the defendant company.

The plaintiff Thomas Alexander Glenny further deposed that the power of attorney was accepted by the defendant company and that he had attended the annual meeting of 1912 as representing the plaintiff company under it; and that the directors of the defendant company had at a board meeting of September 17, 1913, passed a transfer of shares executed by him under the said power of attorney.

The plaintiffs contended that the votes tendered by Lord Churston and Mr. Cornwallis West were improperly admitted and that the votes tendered by Thomas Alexander Glenny as proxy of the plaintiff company were improperly rejected. The votes were so distributed that if the plaintiffs sustained any one of their objections they were entitled to succeed.

Owen Thompson, for the motion. First, the votes given by Lord Churston under the proxies given to him ought not to have been admitted, since he was not a shareholder, and it makes no difference that the other person named in the proxies was competent to have voted. Secondly, the vote given by Mr. Cornwallis West ought not to have been admitted on the mere production of a copy of the resolution. Thirdly, the vote of Thomas Alexander Glenny in respect of the shares of the plaintiff company was improperly rejected. The power of attorney was itself a sufficient proxy, or if not, then the proxy by which he as attorney appointed himself to vote was sufficient. Article 75 ought not to be construed so as to disfranchise a foreign corporation which by its constitution has no common seal and is not required to have one. A foreign corporation is not in a position to take the benefit of s. 68 of the Companies (Consolidation) Act, 1908: see the definition clause in s. 285.

Gore-Browne, K.C., and *Shewell Cooper*, for the defendant company and directors. Article 73 is a complete answer to the first objection, and there is no substance in the second objection: *Wall* v. *London and Northern Assets Corporation*. (1) As regards the third objection, article 75 is clear and explicit in its terms and must prevail. The plaintiff company is a corporation, and that is the only essential point in construing the article. In some articles of association the words "or the hand of its attorney" are added to meet the case: Palmer's Company Precedents, 11th ed., pt. i. p. 705; Table A to the Companies (Consolidation) Act, 1908, art. 65. The power of attorney is in any case insufficient. It is not made by the company itself, but by two directors only, and there is nothing to shew that they were acting as a board. This vote, therefore, was properly rejected, and the motion should be dismissed.

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(1) [1899] 1 Ch. 550.

Norman Daynes appeared for another defendant.

SARGANT J. This is a motion in an action against the defendant company and certain directors to restrain them from excluding three persons from acting as directors, and the principal question is whether, at a general meeting of the company, those three persons were duly elected directors. The votes accepted by the chairman were 23,885 for the three persons in question and 27,108 against them. But these results were arrived at by rejecting some votes, including a large number of votes tendered on behalf of the plaintiff company, and by admitting certain votes tendered by Lord Churston as proxy and another vote tendered by Mr. Cornwallis West as representative of an English company under s. 68 of the Companies (Consolidation) Act, 1908; and the plaintiffs are entitled to succeed if either of the latter votes ought to be excluded or if the votes offered on behalf of the plaintiff company ought to be included.

With regard to the votes given by Lord Churston as proxy, under the articles of association of the defendant company no one is entitled to act as proxy for other shareholders unless he is himself a shareholder, which Lord Churston was not. It is said, however, that the votes were rightly admitted since no objection on the ground that Lord Churston was not a member of the defendant company was taken at the time of the meeting at which the poll was held, and it appears in fact that the shareholders in question had by the proxies appointed as substitute in lieu of Lord Churston another person who was a member of the defendant company and who could properly have voted as a proxy had objection been taken at the time to Lord Churston. Under these circumstances I think that article 73 of the defendant company's articles applies. [His Lordship read the article and proceeded.] I hold, therefore, that the objection founded on the admission of these votes cannot be sustained.

With regard to the vote offered by Mr. Cornwallis West it appears that a resolution had been passed by the English company on behalf of which he tendered the vote pursuant to s. 68 of the Companies (Consolidation) Act, 1908. It is true that all that was produced at the meeting was a copy of that resolution, but the right to vote does not depend upon the evidence offered; it depends upon whether a valid resolution has in fact been passed. No objection has been taken on the ground that no such resolution was in fact passed, and in my opinion the objection to the admission of this vote also fails.

I now come to a much more important question, namely, whether the vote tendered on behalf of the plaintiff company ought to have been admitted. It appears that the plaintiff company is a South African company and does not in fact possess a common seal. Two of its directors, however, executed a very full power of attorney in favour of Mr. Glenny, and, subject to a technical objection to which I will allude later, he was constituted their full attorney with power to vote or to nominate a person to vote, and he did in fact send in a proxy appointing himself to vote. I should also say that the power of attorney had been previously recognized without objection and that he had taken part in a previous meeting as a properly constituted attorney. The objection now made is under article 75 of the defendant company's articles of association. [His Lordship read article 75 and continued.] The neat point arising is whether the corporation referred to in this article means an English corporation only or includes a corporation in any foreign country, whether according to the law of the country in which it is incorporated the corporation has a common seal or not. If according to the former interpretation the second part of article 75 only applies to English corporations, then it is clear that a foreign corporation would be able to appoint a proxy otherwise than under seal because of the enabling words in the earlier part of the article. If the latter interpretation is adopted a foreign corporation having no common seal would be absolutely and entirely excluded from appointing a proxy. In my opinion the broader interpretation is the true one. The provisions of the law of England with regard to corporations do not prevail in all parts of the world. It is impossible to suppose that every corporation throughout the world has a common seal, and in my opinion the words "its common seal" limit the effect of the provision to such corporations as have a common seal according to English law, and to hold otherwise would be to practically disfranchise all corporations which are without a common seal. It is said that South African companies do often procure a common seal for the purpose of enabling persons to vote or in order to execute documents; but such a common seal is not a "common seal" according to the law of England within the meaning of the article. The point is a short one and one of first impression, but in my opinion the corporation referred to in the article is one which has a common seal according to English law. That being so, this vote was rightly tendered by Mr. Glenny at any rate under the proxy, though there may possibly be some technical objection to his voting under the power of attorney alone, that not being in the form required by the articles of association. I think therefore that the chairman should have accepted the vote and that the plaintiffs are entitled to succeed on the motion.

Solicitors: *Cave, Darch, Crickmay, & Rundle; Devonshire, Monkland & Co.*

A. C.

C. A.

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WARRINGTON J.

June 24, 25.

C. A.

Nov. 21, 24.

In re BLAIR OPEN HEARTH FURNACE COMPANY, LIMITED.

[1913 B. 1665.]

Company—Statement in Lieu of Prospectus—Misstatements and Omissions—Allotment of Shares—Void or voidable—Statutory Requirements—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 82; *s.* 87, *sub-s.* 2; *s.* 281.

If a statement in lieu of prospectus has been filed pursuant to s. 82 of the Companies (Consolidation) Act, 1908, and the registrar has given a certificate under s. 87, sub-s. 2, the company can proceed to allotment notwithstanding that the statement contains misstatements and omissions. The meaning of s. 82 is that where no prospectus is issued an applicant for shares shall be able to inspect some document having a similar object; and any applicant who applies for shares on the faith of a filed statement has the same individual right of rescission in the case of misstatement or omission which he would have had if he had relied on a prospectus. The requirements of s. 82 about proceeding to an allotment, however, are satisfied by the mere filing of the statement, whether the particulars are or are not sufficiently supplied, and an allotment is not vitiated by their want of accuracy.

Decision of Warrington J. affirmed.

Motion with witnesses by order.

This was a motion by the Canadian Agency, Limited, under the Companies (Consolidation) Act, 1908, s. 32, to rectify the register by removing the name of the applicants therefrom as the holders of 4500 preference shares of 1*l*. each and 3000 ordinary shares of 1*s*. each, and claiming repayment to the applicants of 2225*l*., the amount paid by them in respect of the preference shares.

The motion was originally launched on the ground that the applicants had been induced to apply for the shares by misrepresentations relating to a proposed guarantee of interest by an American company; but shortly before the motion came on the applicants' solicitors gave notice to the company's solicitors that the applicants also intended to rely on the fact that no sufficient statement in lieu of prospectus had been filed by the company before the allotment of the shares so as to comply with s. 82 of the Companies (Consolidation) Act, 1908, and that the allotments were therefore void.

The facts relating to the promotion of the company were as follows: On July 31, 1912, an agreement was made between the Blair Furnace Company of New York and S. T. Blair (therein called the vendors) and the Cue Consolidated Finance Company, Limited (hereinafter called the Cue Company), whereby the vendors agreed to sell and the Cue Company agreed to buy certain patents, the consideration being 68,750*l.*

Clause 4 provided that if an English company should be constituted as therein contemplated the vendors should be entitled to and should accept 75,000 fully-paid ordinary shares of 1*s.* each in satisfaction of 3750*l.* part of the purchase-money.

Clause 5 provided for the constitution of the English company and provided (inter alia) that it should have a capital of 100,000 seven per cent. preference shares of 1*l.* each and 100,000 ordinary shares of 1*s.* each; that 15,000 preferred shares should be appropriated for working capital, 10,000 for the expenses of formation and the further issue of the company's prospectus, and 10,000 for underwriting, if any; and that the company so to be formed should agree with the Cue Company for the purchase of the patents at an increase in price of not more than 25,000 ordinary shares.

Clause 6 provided that the purchase should be completed on or before August 15, 1912, when (if 30,000 preferred shares should have been subscribed for and allotted) 10,000*l.* cash was to be paid and the 75,000 ordinary shares were to be allotted to the vendors. The balance of the 68,750*l.* purchase-money was to be paid by the Cue Company to the vendors before November 30, 1912, as therein provided.

Clause 7 provided for a guarantee by the vendors of the dividend on the preference shares for a period of ten years.

In pursuance of the conditions contained in the foregoing agreement the Blair Open Hearth Furnace Company, Limited (hereinafter called the English company), was incorporated on August 9, 1912, with a nominal capital of 105,000*l.* divided into 100,000 seven per cent. preference shares of 1*l.* each and 100,000 ordinary shares of 1*s.* each, with a view amongst other things of the acquisition of the said patents. On August 10 the applicants applied for 2500 preference shares, and on the same date the Cue Company agreed to give to the applicants 3000 ordinary shares by way of commission, being at the rate of two ordinary shares for every three preference shares, and those 3000 ordinary shares were afterwards transferred to the applicants. On August 12, 1912, the company filed the statement in lieu of prospectus hereinafter stated, the registrar gave a certificate under s. 87, sub-s. 2, and on August 13 the allotments of shares were made. On the same day an agreement of that date already prepared and made between the Cue Company of the one part and the English company of the other part was executed, whereby it was agreed that the Cue Company should sell and the English company should purchase the patents.

By clause 3 of this agreement it was provided that as consideration for the said sale the English company should pay to the Cue Company the sum of 70,000*l.*, which should be satisfied as to 5000*l.* part thereof by the allotment to the Cue Company and their nominees of the said 100,000 ordinary shares issued as fully paid up, of which 75,000 shares should be allotted to the American company and the remaining 25,000 shares to the Cue Company, and the balance of the said consideration should be paid and satisfied as thereinafter provided.

Clause 5 provided that the purchase should be completed on or before August 15, 1912, when (if the English company should have allotted 30,000 preferred shares) 10,000*l.* cash was to be paid and certificates for 100,000 ordinary shares were to be delivered to the Cue Company or as they should direct. The balance of cash payable to the Cue Company was to be paid prior to November 30, 1912, as therein provided.

Clause 6 provided that the Cue Company should make all the necessary arrangements in connection with such issue, and should pay all the printing, advertising, and other expenses in connection therewith, and also all the preliminary expenses incidental to the formation and incorporation of the English company, including registration duty and fees, but excluding the English company's legal charges and brokerage, and in consideration therefor the English company should pay to the Cue Company

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the sum of 10,000*l.* within fourteen days after the English company should have become entitled to commence business.

Clause 7 provided that the Cue Company should as soon as possible after completion procure the proposed guarantee of interest on the preferred shares from the American company.

The English company did not issue a prospectus on or with reference to its formation, and on August 12, 1912, a statement in lieu of prospectus in the statutory form given in Sched. II. of the Act was filed by the company, which, so far as material, was as follows, the parts filled up by the company being printed within inverted commas :—

Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash	1. “No” Shares of £ fully paid. 2. “No” Shares upon which £ per share credited as paid. 3. “No” Debenture £
The consideration for the intended issue of those shares and debentures	4. Consideration.
Names and addresses of (*a*) vendors of property purchased or acquired, or proposed to be (*b*) purchased or acquired by the company	“The Blair Furnace Co. and Thomas Blair, both of 17, Battery Place, New York, and the Cue Consolidated Finance Co., Ld., 20, Copthall Avenue, London, E.C.”
Amount (in cash, shares or debentures) payable to each separate vendor	“No amount yet payable.”
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill	Total purchase price £ Cash .... £ Shares .... £ Debentures ...... £ “Nil” Goodwill .... £

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Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the Co., or	Amount paid "Nil". ,, payable "Nil"
Rate of Commission	Rate per cent. "Nil"
Estimated amount of preliminary expenses	"£10,000"
Amount paid or intended to be paid to any promoter	Name of Promoter "Cue Consolidated Finance Co." Amount "£10,000"
Consideration for the payment	Consideration:— "Payment of all preliminary expenses of the Co. excluding legal charges and brokerage"
Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the Co. or entered into more than two years before the filing of this statement)	"Agreement dated 31 July, 1912, between the Blair Furnace Co., S. T. Blair, and the Cue Consolidated Finance Co., Ld."

Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the Company, or, where the interest of such a Director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company	"Mr. David Richards is interested as holder in his own name and in the names of nominees of 1800 shares of £1 each in the Cue Consolidated Finance Co., Ld., which has an issued capital of £60,007 in £1 shares all of one class."

It was not suggested that the applicants had applied for their shares on the faith of the particulars contained in the filed statement.

The motion came on before Warrington J. on June 24, 1913.

Clauson, K.C., and *W. Gordon Brown*, for the applicants. The point raised under the Companies (Consolidation) Act, 1908, depends on the true meaning of s. 82. (1) That section is a

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(1) Companies (Consolidation) Act, 1908:—

Sect. 80 provides for the filing of prospectus.

Sect. 81 contains specific requirements as to particulars of prospectus.

Sect. 82: "(1.) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the Registrar of Companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule to this Act.

"(2.) This section shall not apply to a private company or to a company which has allotted any shares or reproduction of s. 1 of the Companies Act, 1907 (7 Edw. 7, c. 50), but either intentionally or by oversight it omits sub-s. 4 of that section, which by incorporating s. 5 of the Companies Act, 1900 (63 & 64 Vict. c. 48), made an irregular allotment under s. 1 of the Act of 1907 voidable at the instance of the applicant within one month after the holding of the statutory meeting, and also made directors liable under certain circumstances to pay compensation.

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debentures before the 1st day of July, 1908."

Sect. 84 provides for the liability of persons responsible for a prospectus.

Sect. 85: "(1.) No allotment shall be made of any share capital of a company offered to the public for subscription, unless" the conditions therein stated have been complied with. . . . .

"(4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eighth day."

Sect. 86: "(1.) An allotment made by a company to an applicant in contravention of the provisions of the last foregoing section shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

"(2.) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of the last foregoing section with respect to allotment he shall be liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages, or costs shall not be commenced after the expiration of two years from the date of the allotment."

Sect. 87: "(1.) A company shall not commence any business or exercise any borrowing powers unless . . . . (*d*) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the Registrar of Companies a statement in lieu of prospectus.

"(2.) The Registrar of Companies shall, on the filing of this statutory declaration, certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled; Provided that in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him."

Sect. 85 of the Act of 1908, imposing restrictions on allotment where the share capital is offered to the public for subscription, which is not applicable to the present case, reproduces s. 4 of the Act of 1900, and s. 86 of the Act of 1908 reproduces s. 5 of the Act of 1900, but s. 86 is in terms applicable to s. 85 alone and not to s. 82. The statute entailing no other express consequences, the result is that an allotment contrary to the terms of s. 82 must be taken to be wholly void. There appears to be no direct authority on s. 82, but in *Finance and Issue* v. *Canadian Produce Corporation* (1) it was decided that an irregular allotment contrary to the provisions of s. 4 of the Act of 1900 was at any rate voidable; and in *Victorian Daylesford Syndicate* v. *Dott* (2) it was held that the contract made by a money-lender who had not registered his name under the Money-lenders Act, 1900, was wholly void.

The language of s. 82 is equally imperative, saying that the company "shall not allot any of its shares or debentures unless" the statutory requirements have been complied with.

The question then is whether the company has complied or sufficiently complied with the statutory requirement of filing a statement "in the form and containing the particulars set out in the Second Schedule."

The statement which was filed by the company in the present case is on the face of it wholly insufficient, some of the particulars required by the schedule not being stated and others not being correctly stated. It appears to have been framed on the erroneous view that the agreement of August 13, 1912, which was already prepared and was executed on the day after the statement was filed, might be entirely disregarded, but even on that footing the effect of the agreement of July 31, 1912, is not sufficiently stated; nor is the interest of the Cue Company in the promotion or property of the English company anywhere disclosed.

Cave, K.C., *A. Sims*, and *Eric Gore-Browne*, for the respondent company. Admitting for the purposes of our argument on s. 82 that the filed statement is in some respects inaccurate, the allotment of shares is not therefore rendered void or voidable.

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(1) [1905] 1 Ch. 37.

(2) [1905] 2 Ch. 624.

The object of the Legislature in s. 82 was to substitute a filed statement for a prospectus so that a shareholder who applied for shares on the faith of a misleading statement might have the same right of rescission as he would have had if he had been induced to take shares on the faith of a misleading prospectus. Sect. 281, moreover, provides a penalty for any wilfully false statement under s. 82. It is unnecessary, therefore, to adopt a construction which would have such far-reaching and disastrous consequences as the construction contended for, rendering void any allotment of debentures as well as shares. *In re South of England Natural Gas and Petroleum Co.* (1) shews that the remedy of the allottee where, apart from actual misrepresentation, the requirements of s. 81 as to the particulars of a prospectus have not been complied with is in damages against the persons responsible for the prospectus, and not by way of rescission. The mere filing of the statement under s. 82 therefore entitles the company to proceed to allotment whether it contains sufficient particulars or not; and this is borne out by s. 87, sub-s. 2, which provides that the registrar shall not give a certificate that such a company is entitled to commence business "unless a statement in lieu of prospectus has been filed with him"—not imposing any condition as to its sufficiency or correctness.

[They were stopped.]

Clauson, K.C., in reply. The language of s. 82 is imperative, and the particulars intended are true particulars and not particulars which whether by mistake or design are false and create a false record. The possible consequences of the construction contended for afford no reason for qualifying the plain words of the enactment.

WARRINGTON J. This is an application by the Canadian Agency, Limited, for the rectification of the register of the Blair Open Hearth Furnace Company by striking out the name of the applicants as the holders of 4500 preference shares and 3000 ordinary shares and for the repayment to the applicants of a sum of 2225*l.* paid on the allotment of the preference shares. The ground on which the applicants originally based their application was that they had applied for and taken an allotment of the shares on a misrepresentation relating to the guarantee of interest at the rate of 7 per cent. per annum on the preference shares by the American company. [His Lordship dealt with this part of the case and came to the conclusion that the applicants' case failed so far as it was founded on this ground, and continued :] I come to a much more serious ground and one which was only raised at the last moment and is not mentioned in the affidavits. That, however, is immaterial, since notice was given by the applicants of their intention to raise it, and the matter has been argued before me. The new ground is that the allotment of all the shares of the company is absolutely void as being ultra vires the company by reason of the company's alleged non-compliance with s. 82 of the Companies (Consolidation) Act, 1908. I will deal with that section in a moment, but I will first mention a few dates. The agreement between the American company and the Cue Company was dated July 31, 1912. The English company was incorporated on August 9, 1912. On August 10, 1912, the applicants applied for their shares, and on the same date the Cue Company agreed to pay to the applicants by way of commission for taking the shares 3000 fully paid up ordinary shares in the English company which were allotted to the Cue Company as promoters, and those shares were afterwards transferred to the applicants. On August 13, 1912, the English company entered into an agreement to purchase from the Cue Company the patent rights and other rights which the American company had agreed to sell. On the same day the allotments were made, and on August 14 the allotment letters were sent out. Sect. 82 of the Companies (Consolidation) Act, 1908, is in these terms. [His Lordship read the section and proceeded :] That section stands by itself. There is no express provision in the Act as to the consequences of failure to file the statement therein referred to, though s. 281 does impose a penalty upon directors and persons in a similar position who wilfully make a false statement in the statement in lieu of prospectus. The argument on behalf of the applicants is that, if the statement so filed contains an inaccurate statement, that is to say, if any of the particulars referred to in

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(1) [1911] 1 Ch. 573, 576.

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the statutory form are not truly stated, then it is not a statement within the meaning of the section, and if it is not a statement within the meaning of the section, then the allotment of the shares by the company is illegal and therefore void. I am inclined to agree with that argument to this extent, that if no statement at all is filed, then, inasmuch as no consequence is imposed by the Act as the result of a failure to file the statement, it must be taken that the statute prohibits the company from proceeding to an allotment of shares and that any allotment of shares would accordingly be illegal. But the question which I have to determine in the present case is a different one for this reason, that on August 12, 1912, before the first allotment of any shares, the company did file a statement in lieu of prospectus, and that statement was in the form and did contain the particulars set out in the Second Schedule to the Act. The argument rests upon this, that though the statement did contain those particulars, it stated them in some respects inaccurately. I have not heard Mr. Cave on that point, but I will assume for the present purpose that the statement did inaccurately state the position with regard to the vendors and the shares to be allotted to them, and that it did omit to state the underwriting agreement or agreement for commission. I will assume all that. But does it follow that such inaccuracy or omission involves the consequence that the whole allotment is void—because under s. 82 it is not a question whether it is merely voidable; it must be either wholly void or good. In the first place, the consequences of any such interpretation of the Act of Parliament would be of the most far-reaching and disastrous character. For example, s. 82 applies to the issue of debentures as well as to the allotment of shares. If the contention which is addressed to me is correct, every debenture issued after a statement had been filed which was inaccurate—it is not necessary to say wilfully false—would be absolutely void, and the unfortunate debenture-holder who had parted with his money would be relegated to the position of an unsecured creditor of the company. So with regard to the allotment of shares, it might turn out years after the event that the allotment of every share in the company was void. It is hardly possible to contemplate such results without a feeling approaching to horror. Can that have

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been the meaning of the Legislature? I think not. In my opinion what the Legislature had in its mind was this. Putting aside for the moment private companies with which we are not now concerned, there are two cases contemplated by the Act—the issue of a prospectus and the non-issue of a prospectus. If a prospectus is issued it is to contain certain particulars; and the result, if any of those particulars are falsely stated, is that a shareholder who takes his shares on the faith of the prospectus is according to the ordinary principles of law entitled to rescind his contract. The other case is that of a company which issues no prospectus. In my opinion it is reasonably clear that what the Legislature intended, in the case of a company which issues no prospectus, is that the company shall place on record with the Registrar of Joint Stock Companies a statement in lieu of prospectus as a document which a person applying for shares may inspect if he pleases. If he does, then that statement becomes in its turn the basis of the contract between him and the company; and if it contains a false statement, it may give him a right to rescind; but to say that the Legislature intended that every allotment should be altogether void if that statement described the name of the auditor wrongly, or contained some other misstatement utterly immaterial to any person applying for shares, is a proposition which I cannot for a moment accept. The result would be to place a company which does not issue a prospectus in a position far more unfavourable than that of a company which issues a prospectus, and in a position which I cannot believe the Legislature to have intended. In my opinion according to the true construction of this section the requirements about proceeding to allotment are complied with if the statement in lieu of prospectus is actually filed. If that statement contains wilfully inaccurate statements, then the appropriate penalty is imposed by s. 281 of the Act, but in my opinion any inaccuracy in the statement does not affect the power of the company to proceed to an allotment of shares. I must therefore refuse this application with costs.

A. C.

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The applicants appealed. The appeal came on for hearing on November 21, 1913.

Clauson, K.C., and *W. Gordon Brown*, for the appellants, repeated their arguments used in the Court below and also referred to *Cope* v. *Rowlands* (1) and *Whiteman* v. *Sadler.* (2)

Gore-Browne, K.C., *Cave, K.C.*, and *Arthur Sims*, for the company, made use of the same arguments as before Warrington J.

COZENS-HARDY M.R. This is an appeal from a decision of Warrington J., and it raises undoubtedly a point of importance under the Companies (Consolidation) Act, 1908, and a point not altogether free from difficulty. The Act, in the group of sections to which I must refer, deals with two separate cases: a company which does and a company which does not issue a prospectus. I put aside private companies, a third case; we have nothing to do with those. In s. 82 there is a provision that "A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the Registrar of Companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule to this Act." That is a clear section. It says that the company shall not allot any shares or debentures unless the statement in lieu of prospectus has been first filed. Then we come to s. 84, which relates to a prospectus, and it provides that certain liabilities are imposed upon directors, not liabilities of a criminal nature necessarily, but liabilities towards the shareholders who have taken shares on the faith of the prospectus or debenture-holders who have done the same. Then s. 85 provides that no allotment shall be made unless certain conditions have been complied with. Sect. 85 only applies to what I call prospectus companies. Then s. 86 says: "An allotment made by a company to an applicant in contravention of the provisions of the last foregoing section"—that is the prospectus section—"shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up." Now it is remarkable—it almost certainly is a blunder in the Act, but s. 86 is limited to a prospectus case, and has no application at all to what I call a statement company. Then we come to s. 87. That section applies to all companies, whether prospectus companies or not, and it says a company shall not commence any business or exercise any borrowing powers unless amongst other things there has been filed with the Registrar of Companies a statutory declaration that the aforesaid conditions have been complied with, and then it says that in the case of a company which does not issue a prospectus the registrar shall not give a certificate, unless a statement in lieu of prospectus has been filed with him. In other words, a company which does not issue a prospectus must, before it can either commence any business or exercise any borrowing powers, leave with the registrar a statement; and a certificate of the registrar when so given is conclusive. Now it has been argued before us that the imposition by Parliament of this obligation upon the company really amounts to this, that there can be no contract, and therefore no allotment which is the completion of an offer made, unless and until the statement has been filed, and that means not merely a statement in the form of a statement answering the questions, but a statement which is substantially true and complete. If that be the right view, then this appeal will succeed, but I am not prepared to take that view. It seems to me that we should be putting into the language of this statute words which I do not find there. I think that when once a statement is left with the registrar and has been filed by him, a statement not illusory, but a statement which in form, so far as the official can see, is complete or reasonably complete —because I do not mean to say that every "i" should be dotted and "t" crossed, but substantially complete—when that has been done, the registrar has no means of testing or examining or questioning the truth of the answers to those questions, and there is an end of the matter; the condition has been fulfilled which entitles the company to carry on business, to exercise borrowing powers, and to allot shares.

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(1) (1836) 2 M. & W. 149.

(2) [1910] A. C. 514, 525.

Now I am very anxious that there should not be any doubt whatever in the mind of company promoters—whose astuteness we have all recognized in years gone by, and I have no doubt we shall all recognize to the end of time—that in my opinion this statement in lieu of prospectus was not frank, was not full, and was not proper, and that it is one which deserves perhaps a more severe comment than I have ventured to inflict upon it. The statutory form is this: "Nominal share capital"—that, apparently, is filled up correctly. "Names of directors"—there is no question about that. Then the minimum subscription, seven shares of 1*s.* each. "Names and addresses of vendors of property purchased or acquired or proposed to be purchased or acquired by the company.' The names of the Blair Furnace Company and Thomas Blair, both of New York, and the Cue Consolidated Finance Company are stated. We have heard an elaborate argument seeking to satisfy us that there cannot be any requirement in the statute or any obligation to state the amount of cash, shares, or debentures payable to each separate vendor—that is the next head in this document—unless there is either a provisional contract which will become binding when this statement is filed or something short of a proposal; but that is a matter which seems to me really to be too clear for discussion or argument. The form requires you to state the names and addresses not merely of vendors of property purchased or acquired, but proposed to be purchased or acquired by the company, and then, when the form talks of "amount in cash, shares or debentures payable to each separate vendor," it seems to me perfectly idle and inconsistent with every part of this form to think that it is satisfied by the words "no amount yet payable" inserted in this statement. I think this form was really intended to deal with that which is almost common practice and common form in these company cases, namely, provision in the articles of association following up the memorandum which contemplates the acquisition of a particular property: an obligation is put upon the company to enter into an agreement after the formation of the company. Among the objects of the company in the memorandum after general words there is this, "with a view thereto to enter into and carry into effect the agreement referred to in clause 3 of the articles of

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association of this company with such modifications (if any) as may seem expedient." Clause 3 of the articles provides: "The company shall forthwith enter into an agreement with the Cue Consolidated Finance Company, Limited, in the terms of the draft which for the purpose of identification has been signed by two of the subscribers hereto, and the directors shall carry the said agreement into effect, with full power nevertheless from time to time to agree to any modification of the terms thereof either before or after the execution thereof. The basis on which the company is established is that the company shall acquire the property comprised in the agreement on the terms therein set forth, subject to any such modification (if any) as aforesaid, and that the first directors of the company are or may be nominated by the vendors, and accordingly it shall be no objection to the said agreement that the vendors as promoters or otherwise stand in a fiduciary position towards the company, or that the directors do not in the circumstances constitute an independent board." It seems to me that that is exactly and precisely the form which the Legislature intended to be followed; there was no contract; there was no agreement, provisional or otherwise, but there was property proposed to be purchased, and it is a matter of common sense to say, it is vital to say, that the amount in cash, shares, or debentures payable to those proposed vendors is a matter, perhaps the most important of all the matters, which in this form ought to have been filled up. I will not go through the inaccuracy, to say the least, of the amount paid or intended to be paid to the promoters, because in my view that does not really affect the decision in this case, but I cannot part with it without saying that I think this statement is as inaccurate and lacking in frankness and fulness as any such statement could very well be. But as a matter of form it is satisfactory; it purports to be an answer to the various questions; it is signed by the proper people who were to sign it according to the Legislature; and that having been done, I cannot bring myself to believe that the effect of the Act of Parliament, in the absence of any provision similar to that which is found in prospectus cases, is that the whole thing, the allotment of shares and everything done by the company, perhaps for years afterwards, should be absolutely null and void. I think that is not the effect of the statute. I agree with Warrington J.'s view. However wrong the answers in the statement may be, however careless, to use no stronger word, the directors may have been, that did not of itself and in the absence of any false representation made to any individual applicant render all the allotments mere waste-paper of such a nature that no liability could be imposed upon the allottee.

For these reasons I think the view taken by the learned judge was right, and this appeal must be dismissed.

SWINFEN EADY L.J. The appeal is by the Canadian Agency, Limited, and it asks that the order below may be reversed, and that the name of the applicants may be removed from the register of members in respect of certain preferred participating and ordinary shares. When the motion was launched there were certain grounds upon which the applicants contended that they were entitled to relief. Those grounds were dealt with in the Court below, and so far as those grounds are concerned they have not been made the subject of appeal, and they need not be further referred to. But before the case came on for hearing the applicants had ascertained that the statement filed in lieu of prospectus was in their view insufficient, and accordingly they gave notice to their opponents that upon the hearing of the application that additional matter would be relied upon in support of their application.

The case has never been put forward, either in the Court below or on the appeal, that the applicants saw that statement or were in any way misled by it. Quite frankly the appellants, not only here, but in the Court below, stated they had not seen the statement, and they did not rely upon the fact that they were themselves misled by anything either contained in it or omitted from it. They said that the statement was insufficient in point of law, and being insufficient, that there was no statement within the meaning of the statute, and therefore they were entitled to say that the allotment was void. That ground failed in the Court below and it has been urged again before us by way of appeal.

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Swinfen Eady L.J.

The present case comes within s. 82 of the Companies (Consolidation) Act, 1908, which provides that a company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares or debentures unless before the allotment of either shares or debentures there has been filed with the Registrar of Companies a statement in lieu of prospectus signed by every person who is named therein as a director or proposed director of the company or by his agent authorized in writing and in the form containing the particulars set out in the Second Schedule to the Act. It has been pointed out that in the previous statutes there was a provision that in the event of the corresponding enactment in the earlier statute not being complied with, then within a certain time the allotment was voidable. In the Act of 1908 with regard to this clause there is no corresponding provision as to its being voidable. Sect. 82 says the company shall not allot, but does not go on to say that if it does allot, the allotment within a certain time shall be void. It was argued in the first place that the statement which had been filed was sufficient, and that the certificate that the company was entitled to commence business was conclusive evidence of that, and that the matter could not be further questioned. Sect. 87 contains this provision: "A company shall not commence any business"—not "its business" but—"shall not commence any business or exercise any borrowing powers unless" certain conditions have been complied with; and then it provides in sub-s. 2 that the Registrar of Companies shall on the filing of the statutory declaration referred to certify that the company is entitled to commence business and that that certificate shall be conclusive evidence that the company is so entitled. That is with regard to companies which do issue a prospectus. Then it goes on to say in the same sub-section of s. 87: "Provided that in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him." By reason of that provision that the certificate entitling the company to commence business is not to be given by the registrar unless that statement has been filed, it was argued that, this company having obtained the certificate, it was conclusive evidence that a statement complying with the statutory provisions had been filed. In my opinion that is not so. All that the certificate is conclusive evidence of is that the company is entitled to commence business, that is to say, the persons entering into contracts and otherwise dealing with the company may give faith to the certificate that the company is entitled to commence business; but notwithstanding the company may have obtained the certificate this question may still be raised. It was next said that as the statute does not contain any penalty in terms for the company allotting in breach of s. 82, such an allotment could not be considered invalid; that there were no provisions in the statute to render the allotment invalid as there had been in previous statutes. It may or may not have been a casus omissus; it may be that in the consolidating statute the point was lost sight of; but in my judgment the effect of this statutory provision that a company shall not do a certain thing—that is in this particular case shall not enter into a contract, because the allotment following the application constitutes a contract to take the shares—this prohibition that the company shall not enter into the contract completely prohibits and prevents the company from legally entering into a contract. I think that on this point the case cannot be distinguished from the case in the House of Lords of *Whiteman* v. *Sadler*. (1) Lord Dunedin put it in this way, referring to what Farwell L.J. had said: "The principle, he says, is that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party who seeks to enforce it. To the principle, as stated, I do not think any exception can be taken, except that it might, indeed, be amplified by the insertion of the words 'or impliedly' after 'expressly.'" It would then read: "The principle is that a contract which is expressly or impliedly forbidden," and so on. "But there always remains the question whether the contract is expressly or impliedly forbidden by Act of Parliament. This is not always an easy question. It is simple enough where a certain contract is prohibited."

Now in my opinion that is this case. It is simple enough here where in terms the statute prohibits a company from allotting shares where a statement in lieu of prospectus has not been filed. Therefore, with regard to the second point made by Mr. Gore-Browne, that there was nothing in the statute to render the allotment invalid, I am of opinion that if no statement had been filed the allotment would have been invalid.

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(1) [1910] A. C. 514, 525.

But there remains the question whether a statement in lieu of prospectus has been filed. The appellants first urged that there were errors and omissions in it, and then, on being pressed a little, I think they conceded that error would not be sufficient, that they could not really argue that if there were comparatively small errors in the statement that had been filed they could say there was no statement which had been filed within the meaning of the statute; but ultimately, I think, in substance their argument came to this, that this particular statement, knowing the facts as we now know them, was really illusory, and so far from containing all the particulars that it ought to contain, in truth and in fact the position really must be taken to be the same as if no statement at all had been filed; that such a statement as this is worthless, and it is not a compliance with the statute to file such a statement. In substance that was the argument which has been addressed to us. Now in considering the statement one must bear this in mind, that this statement is to be filed before the certificate is given to commence business. The effect of that is that it must be filed before there can be any contract absolutely binding upon the company. That is clear. There was a case before Buckley J. after the Act of 1900 had been passed and before the Act of 1908. It was a question of a prospectus, not a statement in lieu of prospectus. It is *In re Otto Electrical Manufacturing Co.* (1905). (1) It was a claim by a person claiming to be a creditor of a company which had gone into liquidation without ever having obtained this certificate to commence business. He had made certain alleged contracts with the company. He claimed to prove in the winding-up as a creditor for money paid for furnishing offices of the company, and the claim was disallowed. Buckley J., as he then was, said (2): "Now this company never did become entitled to commence business; therefore any contract made by the company was provisional and not binding on the company. But Mr. Coldridge has argued that the Act of Parliament does not mean what it says, that it does not mean any contract, but any contract of a certain kind; and his next difficulty is to define of what kind. He says that it means any contract entered into for the purpose of carrying on its business, and that there are some contracts which are not entered into for the purpose of carrying on the business, but which are what he calls 'preliminary'—as for expenses incurred with a view to the future carrying on of business. I think that argument is altogether unsound." Then, after dealing with that, the learned judge says (1): "The intention here is that, if the company never becomes entitled to commence business, nobody shall be able to say that he can sue the company in contract; the contract must be one which impliedly contains a provision that, unless and until the company is entitled to commence business, the company is not bound." At the date when this statement in lieu of prospectus was filed, therefore, the position of the company was that it was not entitled to enter into firm contracts, but only provisional contracts which might become binding at a subsequent date. I think that that position of the company must be borne in mind when you consider the form of the statement in lieu of prospectus and see the various matters which the promoters and directors are asked to set forth in the document. From beginning to end it is manifest that it is a document having reference to the proposed scheme of the company. It states the names, addresses, and descriptions of the directors or the proposed directors. Then it deals with the shares and debentures agreed to be issued as fully paid or partly paid up otherwise than in cash. There can be no valid and binding agreement; it can only mean a provisional agreement. Then with regard to the property "The names and addresses of the vendors of property purchased or acquired or proposed to be purchased or acquired by the company." Then again "The amount (if any) paid or payable in cash, shares or debentures for any such property," and so with the "amount paid or intended to be paid to any promoter." In my opinion the object of this statement in lieu of prospectus is to give substantially the same information as would be given in the prospectus itself, and to set out in this statement what the scheme of the promoters really is as regards the property which it is proposed to acquire, the consideration to be paid, the remuneration which the promoters will obtain from it, and to give in fact full particulars of the venture. The statement that has been actually filed contains the most meagre particulars possible, and I certainly am not satisfied with the explanation tendered on behalf of the respondents on many points. It has been difficult to follow. They set out with regard to the amount paid or intended to be paid to any promoter, 10,000*l.* There was also the promoters' profit of the 25,000 shares, and I could not follow that any substantial distinction was drawn between the position in law of the 10,000*l.* for preliminary expenses and the 25,000 shares for profits. In both cases it was proposed to pay it and to enter into a contract dealing with it on that footing: in neither case was there any firm contract binding the company at that moment. So with regard to several other matters. But although the statement is incomplete—I think inaccurate and insufficient as a statement—still I am unable to arrive at the conclusion that it is not really a statement within the meaning of s. 82. Ex facie it answers the questions. The Registrar of Joint Stock Companies could not know whether the statements were accurate or not; he had no knowledge of the state of facts at the time that this statement was tendered to him. He accepted it, and upon the face of it it answered all the questions contained in the statutory form.

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(1) [1906] 2 Ch. 390.

(2) [1906] 2 Ch. 392.

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(1) [1906] 2 Ch. 393.

Therefore, I am unable to arrive at the conclusion that the appellants ask us to arrive at, that it was so illusory as not to be a statement at all. In my opinion it is a statement, and technically I think that the provision of s. 82 of the Act has been complied with, and therefore the appellants are unable to maintain their argument that the allotment to them is wholly void. Having said that, I think that such a statement as this is strongly to be discountenanced, and that anything in the nature of such a sketchy and insufficient document should be wholly avoided by promoters in future.

I agree in the opinion of the Master of the Rolls that the appeal fails.

PHILLIMORE L.J. I agree that the appeal fails. I accept the argument of the appellants that the effect of s. 82 is to make an allotment of shares or debentures by a company which is not a private company, and which does not issue a prospectus and does not file a statement in lieu of prospectus, not voidable but void. A statement which gives with sufficient fulness the information required by the Act and is not self-contradictory, and may therefore be considered as ex facie good, is in my opinion a sufficient compliance with the provisions of the statute. What would be the case if the statement was not ex facie good, but was nevertheless accepted by the Registrar of Joint Stock Companies, and whether or not his certificate would be under s. 87 conclusive, it is not necessary to determine; and as far as I am concerned I do not propose to express any opinion about it. Here the statement, which in my view is liable to all the condemnation which the Master of the Rolls and Swinfen Eady L.J. have passed upon it, is nevertheless ex facie good. The object of the statute is sufficiently obtained if promoters are tied down to stating that which might be relied upon by disappointed shareholders seeking to obtain relief, and at any rate may be a matter of criminal proceeding under s. 281.

Appeal dismissed.

Solicitors: *Linklater, Addison & Brown; Birkbeck, Yeo & Co.*

H. C. R.

S. V. NEVANAS & CO. *v.* WALKER AND FOREMAN.

[1913 S. 2708.]

SARGANT J.

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Dec. 2, 3, 11.

Restraint of Trade—Meat Importers—Other Business similar to that of Employer—Severance of Covenant—Reasonableness—Nature of Business—Area of Restraint—Time Limit of One Year—Injunction.

In 1908 the plaintiff company agreed to employ the defendant F. as manager of the company at Liverpool for five years from January, 1909, and by clause 7 it was provided that the manager should not for a period of one year after the determination of the agreement, whether by effluxion of time or in any other way whatsoever, either solely or jointly with or as agent for any other person, firm or company, directly or indirectly carry on or be engaged, concerned or interested in carrying on, within the United Kingdom the trade or business of an importer of meat or an agent for importers of meat, or any other trade or business similar to any trade or business carried on during the period of his employment by the company (except with the consent in writing of the directors for the time being).

At the date of the agreement the plaintiff company's business as importers or agents for importers was confined to the Australasian trade as distinguished from the American trade, though they did some business as wholesale dealers in meat, including American meat. The business was conducted almost entirely in the north of England and the Midlands, but it had since undergone considerable expansion. In proceedings to enforce clause 7 of the agreement it was admitted that the concluding part of the clause was too wide, but it was contended that the clause was severable and that the first part was not too wide and was enforceable by injunction:—

Held, that clause 7 of the agreement was severable, but that the restraint against carrying on within the United Kingdom the business of a meat importer or agent for meat importers was wider than was reasonably required for the protection of the plaintiff company: (1.) because it embraced the American trade as well as the Australasian trade and could not be fairly construed as referring to the latter trade alone, and (2.) because it extended to the whole of the United Kingdom, and that the clause was therefore void as being in undue restraint of trade notwithstanding the time limit of one year.

To preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification.

Ward v. *Byrne* (1839) 5 M. & W. 548, followed.

Observations of Lord Moulton on the severability of covenants in restraint of trade in *Mason* v. *Provident Clothing and Supply Co.* [1913] A. C. 724, at p. 745, considered.

TRIAL OF ISSUE.

This was an action in which the plaintiff company claimed

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(1.) an injunction to restrain the defendant Walker from inducing the defendant Foreman to enter into his employment or to be engaged in his business of a meat importer contrary to the provisions of certain agreements of service made between the plaintiff company and the defendant Foreman; (2.) an injunction to restrain the defendant Foreman from entering his employment contrary to the provisions of such agreements; and (3.) damages against both defendants.

The plaintiff company had moved for an injunction until the trial, and it was then directed that the question whether the defendant Foreman's covenant contained in an agreement of employment and service dated December 31, 1908, was void or unenforceable as being in undue restraint of trade should be tried as a separate issue under Order xxxvi., r. 8, on the affidavits filed on the motion, with liberty for either party to cross-examine the deponents. The issue now came on to be tried accordingly.

The following statement of the facts is taken from his Lordship's written judgment.

The defendant Foreman, who is now twenty-four years of age, had been in the wholesale meat trade since he was fifteen, and had until about the beginning of the year 1907 been exclusively engaged in the South American trade. Some time in the early part of the year 1907 a Mr. Sydney Vigars Nevanas, who had not theretofore engaged in the meat trade, but had, as I gather, some other merchant's business, came into relations with the defendant Foreman and asked for his assistance in starting an Australian wholesale meat business. A contract of employment and service was accordingly entered into dated August 24, 1907, in which Mr. Nevanas is described as carrying on the business of a wholesale meat broker and agent at Liverpool; and he agreed to employ the defendant Foreman as manager of that business. The term of employment was to be three years, the remuneration was to be a fixed salary of *5l.* per week and a commission to be afterwards mutually agreed; and by clause 10 of the agreement Foreman was not, for a period of one year after the determination of his employment, to be engaged in any capacity in the business of a wholesale meat broker or agent, or any other business of a nature similar to any business carried on by Nevanas at the time within a radius of ten miles from Liverpool.

By December, 1908, some expansion had taken place in the business and branches had been opened at Manchester and Nottingham. Further—for on this point I am inclined to prefer the recollection of Mr. Nevanas to that of Mr. Foreman—visits had been paid by Mr. Nevanas and Mr. Foreman together, or by the latter alone, to London, Dublin and Glasgow, and also I think to one or two provincial centres, for the purpose of seeing whether the business might not be profitably extended to several of those places; and so far as the first three named places were concerned it was considered that there were favourable opportunities for business. I cannot, however, think that there was ever any reasonable prospect or intention of extending the operations of the company over the whole or anything like the whole of the United Kingdom, or even over the whole or nearly the whole of the ports of the United Kingdom which did or might do a considerable trade in foreign meat.

In December, 1908, Mr. Nevanas made over the business to the plaintiff company. The capital of that company was 30,000*l.*, of which 26,000*l.* was issued to Mr. Nevanas and his nominees, credited as fully paid up, in return for the transfer of the business; so that there was not, by reason of the transfer, any considerable addition to the resources of the business. It is unnecessary to refer to the memorandum and articles further than to state (*a*) that the business was described as that of "an importer of meat and agent for importers and dealers in meat" carried on at Liverpool, Manchester, and Nottingham; (*b*) that Mr. Nevanas was constituted governing director of the company, with full overriding powers of management; and (*c*) that provision was made for the appointment of employee directors, under which Foreman was in fact subsequently appointed. Simultaneously with or immediately after his transfer of the business to the plaintiff company the agreement of August 24, 1907, was superseded by an agreement dated December 31, 1908, and made between the plaintiff company and the defendant Foreman. By that agreement it was amongst other things provided:

"1. The company will employ the manager and the manager will act as the manager of the company at Liverpool aforesaid for the term of five years from January 1, 1909, and thereafter until this agreement shall be determined by either party hereto giving to the other three months' notice in writing of such intended determination.

"2. During the continuance of this agreement the manager shall devote the whole of his time during the business hours of the company to the business of the company and shall use his best endeavours to promote the interests and welfare of the company. He shall not either before or after the termination of this agreement disclose to any person whatsoever any information relating to the company or its customers or any trade secrets of which he shall become possessed while acting as manager."

"4. The manager shall exercise and carry out all such powers and duties and shall observe all such directions and restrictions as the governing director or managing director or board of directors may from time to time confer or impose upon him but in default thereof the manager shall control the general management of the business of the company at Liverpool under the supervision of the governing or managing director of the company and shall have power to suspend but not to dismiss any of the clerks or servants of the company (other than the secretary) and to enter into any trade contracts on behalf of the company in the ordinary way of business and to do all other acts and things which he may consider necessary or conducive to the interests of the company.

"5. The manager shall be entitled by way of remuneration for his services to an annual salary of 468*l*. to be paid monthly."

"7. The manager shall not for a period of one year from the determination of this agreement, whether by effluxion of time or in any other way whatsoever, either solely or jointly with or as agent for any other person firm or company, directly or indirectly carry on or be engaged concerned or interested in carrying on within the United Kingdom the trade or business of an importer of meat or agent for importers of meat, or any other trade or business similar to any trade or business carried on during the period of his employment by the company (except with the consent in writing of the directors of the company for the time being); and will for every breach of any stipulation contained in this clause pay to the company the sum of 50*l.* as liquidated damages; and it is declared by the parties hereto that such sum shall without proof be deemed to represent the damage actually sustained by the said company by reason of every such breach.

At the time of the transfer of the business to the plaintiff company Mr. Nevanas was not importing any meat from Australia on his own account, but was acting as agent for various firms of importers, whose names he gave. In some cases he sold in the provinces as sub-agent for the London agent of two of these firms; in other cases he sold in the provinces as the direct agent of the firm. In some cases he had an exclusive agency; in others he was one of an indefinite number of persons selling on commission for the same principals. But at that time, and ever since, the whole of the business, so far as consisting of agency for importers or importation as a principal, has been concerned with Australian and New Zealand meat only, and has never been concerned with meat from South America or North America. In addition to this business, however, there has throughout been a considerable general wholesale meat business amounting to something like one-third of the total business, and this branch of the business has not been confined to Australasian meat, but has included American meat. Further, in the course of this business, carcases have been bought on the high seas, and, as I gather, frequently upon the terms of the bills of lading having been handed over and the property in the meat passing; and in the case of purchases made on these latter terms it is obvious that the business of wholesale dealing in meat is little, if at all, removed from that of importing meat, for the purchaser takes the place, and stands in the shoes, of the original importer at a certain stage in the proceedings, and, indeed, prior to the actual importation, and has the option either of actually importing the meat or of having it consigned by transhipment or otherwise to some foreign port. In fact, the evidence in the case has satisfied me that the operations of importing and of wholesale meat dealing are not divided

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from each other by any hard and fast line, but in many cases very closely approach if they do not actually merge in each other; and, further, that there is no radical distinction between the methods of dealing with Australian meat and American meat.

As regards the area or extent of the business, it appears in the year 1908 to have been confined almost entirely to Liverpool, Manchester, and Nottingham, and to a number of towns in the north of England and the Midlands. Mr. Nevanas furnished a list of some thirty-six towns in which the plaintiff company had done business, but the secretary of the company subsequently struck eleven of these towns off as being towns in which there were no customers until after December, 1908. There was practically no business at all in the south of England; there was only one customer in the whole of Ireland; there was no business in Scotland except to some small extent in Glasgow, where, however, a branch was opened later; and there was no customer at all in Wales, for a man named Woodley at Cardiff, who was at first claimed by Mr. Nevanas as a customer in 1908, turned out afterwards to have made his first purchase to an extent of some 7*l.* in the year 1909.

For a year or more the business of the company appears to have proceeded without much change or expansion. But in 1910 Mr. Nevanas became acquainted with the defendant Walker, who seems to have had very valuable business connections with Australia, and arrangements were made with him under which he was to buy exclusively on behalf of the company there. These arrangements continued until September, 1913, and undoubtedly resulted in a great and unexpected expansion of the company's business. In September, 1913, however, differences arose, and the arrangements with Walker came to an end, and he is now proposing to enter into some similar business relations with the defendant Foreman, unless the plaintiff company can establish their right to stop it. I should add, to complete the history of the company's operations, that the Nottingham branch was given up about the year 1909 and the Manchester branch about the year 1913, while, on the other hand, a branch was opened in London in 1910 and in Glasgow in 1912.

P. O. Lawrence, K.C., *Romer, K.C.*, and *R. Rowlands*, for the plaintiff company. The action is brought on the first branch of the covenant contained in clause 7 of the agreement relating to carrying on business in the United Kingdom of a meat importer or agent for meat importers, which is clearly severable from the branch relating to any other trade or business. The only defence is that this branch of the covenant is also too wide, which really depends upon whether the restraint imposed was reasonably required for the protection of the employers' business. The business at the time was one which was carried on with hopes of expansion; and to make the restraint apply to the whole of the United Kingdom was not unreasonable having regard to the character of the business and the trust and confidence reposed in the defendant Foreman as manager. It would be injurious to the plaintiff company if he were entitled to go into the service of trade rivals taking with him his knowledge of the plaintiff company's sources of supply in Australasia. The trade is in few hands, and a rival business of importation for use in the United Kingdom could be conducted in Southampton, Glasgow, or Dublin as easily as in Liverpool.

Moreover, in considering whether the restraint is unreasonable, the Court will take into account the fact that it is limited to the period of one year. *Leng & Co.* v. *Andrews* (1) is distinguishable, as there the restraint was for the whole life of the employee, who was engaged on a newspaper, but the observations of the Court in that case are in our favour. The frozen meat trade is a comparatively new business, and there is nothing which can be described as usual or customary in connection with the restraint imposed. In *Lamson Pneumatic Tube Co.* v. *Phillips* (2) the Court of Appeal (dissentiente Cozens-Hardy L.J. and reversing Farwell J.) enforced a restraint extending "within the limits of the Eastern Hemisphere." The question is to be determined by the consideration whether the employers' interests required the restraint imposed on the employee and not by any consideration of personal hardship on the employee. It is a question between the employer's interests and the public interest: *Mason*

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(1) [1909] 1 Ch. 763.

(2) (1904) 91 L. T. 363.

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v. *Provident Clothing and Supply Co.* (1) If the evidence in the present case shews that the restraint, so far as the American trade is concerned, was not required for the protection of any interests of the plaintiff company, then the clause should be construed as applying to the Australasian trade alone, that being the subject-matter which the parties had in their minds. There is a long line of authority for giving such a limited meaning to general words in contracts of this kind: *Avery* v. *Langford* (2); *Mills* v. *Dunham* (3); *Moenich* v. *Fenestre* (4); *Dubowski & Sons* v. *Goldstein* (5), where Lord Esher M.R. says: "It is an ordinary canon of construction that the meaning of words in an agreement which, taken by themselves, are quite general may be confined to a particular subject-matter with which the parties were dealing." In *Perls* v. *Saalfeld* (6), which was itself a case on the other side of the line, Bowen L.J. recognizes this general rule. He says: "It is perfectly true that if you take the first part alone, applying to it the doctrine which has been applied in *Avery* v. *Langford* (2) and in other cases, and construing that part upon the principle of giving effect to a document, rather than of putting a construction upon it which would make it void at law, you would arrive at the view that the language, although general, was meant to be controlled by the circumstances of the case, and to be read only in the sense that a situation in a business similar to that carried on by Messrs. Perls & Co. was not to be taken without their leave." [They also cited *Rannie* v. *Irvine*. (7)]

Martelli, K.C., and *W. A. Jolly*, for the defendant Foreman. The question in the present case is not whether the plaintiff company might or might not have taken a covenant from the defendant Foreman not to set up in business with the defendant Walker, but whether the actual agreement which they have taken is or is not in undue restraint of trade. The authorities establish the following propositions: (i.) that a covenant is severable only where the severance is clear on the language used and the excess is of trivial or technical importance only: *Mason* v. *Provident Clothing and Supply Co.* (1); (ii.) that the critical period is the date when the agreement is made, and not the date when it comes to be enforced after any possible extension of the business: *Dowden & Pook* v. *Pook* (2); and see per Cozens-Hardy L.J. in *Lamson Pneumatic Tube Co.* v. *Phillips* (3); (iii.) that if the area be too wide a restraint will be held bad however short the period during which it runs; *Ward* v. *Byrne* (4), which was cited with approval by Lord Herschell L.C. in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (5); and see *Haynes* v. *Doman* (6); *Pearks* v. *Cullen* (7); and (iv.) that there is a distinction between a restraint annexed to the sale of the goodwill of a business or on a dissolution of partnership and a restraint imposed on an employee under a contract of service, the restraint being more readily upheld in the former cases: *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (8); *Mason* v. *Provident Clothing and Supply Co.* (9)

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(1) [1913] A. C. 724, per Lord Shaw, at p. 740.

(2) (1854) Kay, 663.

(3) [1891] 1 Ch. 576.

(4) (1892) 61 L. J. (Ch.) 737.

(5) [1896] 1 Q. B. 478, 481.

(6) [1892] 2 Ch. 149, 153.

(7) (1844) 7 Man. & G. 969.

Applying these rules to the facts of the present case and treating the covenant as severable, the first branch as well as the second branch of clause 7 is too wide. The plaintiff company's business of meat importers or agents for meat importers at the date of the agreement was and still is confined to the Australasian trade, but the terms of clause 7 are such as to embrace the American trade as well, and cannot on any fair construction be limited to the Australasian trade alone.

In *Avery* v. *Langford* (10) the action was for specific performance, and on the present point the case is inconsistent with *Baker* v. *Hedgecock* (11); nor can the plain language of this agreement be brought within the canon of construction stated by Lord Esher M.R. in *Dubowski & Sons* v. *Goldstein* (12); and *Rogers* v.

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(1) [1913] A. C. 724, per Viscount Haldane L.C., at p. 732; per Lord Moulton, at p. 745.

(2) [1904] 1 K. B. 45, 55.

(3) 91 L. T. 363, 370.

(4) 5 M. & W. 548.

(5) [1894] A. C. 535, 544.

(6) [1899] 2 Ch. 13.

(7) (1912) 28 Times L. R. 371.

(8) [1894] A. C. 535, per Lord Herschell L.C., at p. 548.

(9) [1913] A. C. 724, per Viscount Haldane L.C., at p. 731; per Lord Shaw, at p. 737.

(10) Kay, 663.

(11) (1888) 39 Ch. D. 520.

(12) [1896] 1 Q. B. 478, 481.

Maddocks (1) shews that unambiguous words cannot be cut down so as to refer to a special class of business alone.

[SARGANT J. referred to *Price* v. *Green.* (2).]

Moreover, the business of the plaintiff company at the date of the agreement was limited to the north of England, and a restraint extending over the whole of the United Kingdom was quite unnecessary for the protection of their interests. The subsequent expansion of the business was fortuitous and mainly due to the introduction of the defendant Walker in 1910. The result of the authorities is that a restraint extending to the whole of the United Kingdom is prima facie void: *Lamson Pneumatic Tube Co.* v. *Phillips* (3); *Underwood & Son* v. *Barker* (4); *Stuart & Simpson* v. *Halstead* (5); and the reported cases where such a restraint has been held good have generally related to some manufacturing business involving trade secrets. The control of the operations of the company was in the hands of Mr. Nevanas, and there was nothing of a confidential nature in the employment of the defendant which would justify so wide a restraint.

A. Grant, K.C., and *P. F. Stokes*, for the defendant Walker, took no part in the argument.

Romer, K.C., in reply.

Cur. adv. vult.

Dec. 11. SARGANT J. delivered a written judgment in which, after stating the facts as above set out down to and including the agreement of December 31, 1908, his Lordship continued: The questions of law which have now to be determined arise on this agreement, and particularly on clause 7 thereof, and on that part of clause 7 which prohibits the carrying on of the business of an importer of meat or agent for importers of meat. Here I may clear the ground at once from a suggestion that, in view of certain remarks of Lord Moulton in the recent case of *Mason* v. *Provident Clothing and Supply Co.* (6), this part of the covenant is invalidated, because the succeeding part of the covenant, namely, that prohibiting the carrying on by the manager of any trade or

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(1) [1892] 3 Ch. 346.
(2) (1847) 16 M. & W. 346.
(3) 91 L. T. 363, 370.
(4) [1899] 1 Ch. 300.
(5) (1911) 55 Sol. J. 598.
(6) [1913] A. C. 724, 745.

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business similar to any trade or business carried on during the period of his employment by the company, is, admittedly, too wide. I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants. No question of the kind was involved in the case before the House of Lords, and I think that Lord Moulton was not intending to deal with the numerous cases of high authority in which the good part of such a covenant was held to be enforceable, notwithstanding its collocation with a bad part, but was only thinking of those cases in which some severance has been effected by the Court, and the covenant has not been held bad merely because it might work unreasonably in certain exceptional circumstances not within its main and principal purpose and meaning. [His Lordship then stated the further facts as above set out, and continued:]—

The plaintiffs' case, in favour of the reasonableness of the covenant as originally opened to me, was mainly founded on three propositions—namely, (1.) that no case could be found where the Court had refused to enforce a restraint, however wide in area, if it was for so short a period as a year; (2.) that the trade was in few hands and could readily be carried on all over the United Kingdom from any part of it; and (3.) that it was, at any rate, reasonable to bind a person in the position of a manager, since he would have valuable information as to the sources of supply.

As regards the first proposition, however, the industry of the defendants' counsel has resulted in finding a case of *Ward* v. *Byrne* (1), where the restraint was held bad, though for nine months only, and in that case there is cited a case in the Year Books where the restraint was held bad, though for six months only. Nor can I see on principle how, if the area of restraint is clearly unreasonable, a covenant of this kind can be saved merely because of its reasonableness as to time. As regards the second proposition, it is sufficient to say that it is not supported by the evidence, and indeed that the evidence, so far as it goes, rather tends to support the view that in order to do any business on any considerable scale in a place, and particularly in a distributing centre such as a port, it is necessary to have a place of business or agency there. As regards the third proposition, even assuming that the defendant Foreman was in the position of an ordinary manager, I cannot think that the danger in question necessitates so wide a covenant as that contained in clause 7 of the agreement of 1908 or could not be sufficiently guarded against by a much more definite and limited stipulation.

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(1) 5 M. & W. 548.

As the case went on, and particularly after certain admissions which were made by Mr. Nevanas and which I will refer to later, it became necessary, as was frankly admitted by Mr. Rowlands, to make a considerable change in the position taken up by the plaintiffs, and accordingly it was strongly urged upon me that, having regard to the position of the plaintiff company and the defendant Foreman in December, 1908, the covenant against carrying on the business of an importer of meat or agent for importers of meat, though general in its terms, should be so construed as to be limited to the importation of Australian meat or Australasian meat, and a number of cases from *Avery* v. *Langford* (1) onwards were cited as justifying such a construction. I have been unable to find any principle of construction in these cases which would justify me in limiting in this way the plain and unambiguous words of the particular agreements now in question, which, in my opinion, prohibit the defendant Foreman from importing meat from Australia, New Zealand, the Argentine, Canada, or any other external source of supply; and I cannot shut my eyes to the acknowledged fact that, as regards beef at all events, the main source of supply is South America; that the defendant Foreman had had his main experience in the American trade; and that Mr. Nevanas had dealt in American meat, though not as an importer or agent for importers in the strictest sense.

Now, if this is so, the covenant is undoubtedly too wide in this respect for the reasonable protection of Mr. Nevanas, for in his cross-examination he acknowledged that the plaintiff company would not be hurt or interfered with at all if the defendant

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(1) Kay, 663.

Foreman set up as an importer of South American meat in London or in Dublin, or anywhere else, so long, of course, as his operations were confined to South American meat.

This alone appears to me to be sufficient to dispose of the case in favour of the defendants. But I also think that the covenant is too wide as extending to the whole of the United Kingdom. In December, 1908, which is the material date to be considered, as I have already stated, the company had not in fact, and had no probability of obtaining, so widespread a business as to require a protection extending over the whole area of the United Kingdom; and this was most effectively brought out in that part of the cross-examination of Mr. Nevanas in which he was invited to point out the particular damage to the plaintiff company which might be caused by the defendant Foreman importing Australian meat into such places as Dublin and Cork. For in his answers to these questions he was only able to frame at most a general or vague possibility of damage such as he would share with all other importers of Australian meat, while in the case of importation into Cork he acknowledged that no damage at all would occur if the defendant Foreman confined his business to local customers. To preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification. In my judgment, not only have the plaintiffs failed to prove affirmatively a sufficient justification for the covenant, but it has been shewn against them that the covenant was not as framed (and I think this is what I have to consider) necessary for their reasonable protection.

Indeed I cannot help thinking, particularly having regard to some answers given by Mr. Nevanas at the end of his cross-examination, that the mere setting up by the defendant Foreman as an importer of Australian meat would not affect Mr. Nevanas to any appreciable extent; but that what he is really afraid of is the combination of the defendant Foreman with the defendant Walker in view of the latter's knowledge of the Australian sources of supply. Further, I am struck with the contrast between the terms as to area of the covenant entered into in 1907 and those of the covenant entered into in 1908, and I do not think that any sufficient reason has been furnished for the extraordinary extension of those terms which took place in 1908.

In the view that I have taken of the case it has really become unnecessary to consider with any particularity whether the defendant Foreman was in the position of an ordinary manager or was really only the head of the sales department in Liverpool, or to deal with the trade evidence that has been given. On the first of these points, however, it would seem clear that the defendant Foreman was never in the position of the general manager of the company, or even the principal manager at Liverpool. For Mr. Nevanas was here himself as a rule, and even when Mr. Nevanas was abroad the branches in London and Glasgow were managed independently on the spot, and the centralized administration of the general affairs of the company seems to have been in the hands of Mr. Hill, the secretary of the company. Indeed the defendant Foreman appears to have been little if anything more than the manager of the principal department, that is, the sales department, of the plaintiff company's business in Liverpool. As regards the second of these points, any direct evidence of the various trade witnesses as to what was or was not a reasonable covenant was, of course, inadmissible, but their evidence as to how far there was a personal goodwill in the business and as to what was usual in the trade was free from objection and was of some value as an indication of prima facie reasonableness. The whole of this evidence is in favour of the defendant Foreman; and this is the more remarkable because, from the position of most of the witnesses, one would expect their sympathies to be with the plaintiff company rather than with the defendants.

In the result I must decide the present issue adversely to the plaintiff company.

Solicitors: *Kenneth Brown, Baker, Baker & Co.; Leslie Field, Brownjohn & Co.; Parker, Garrett & Co.*

A. C.

In re CUNNINGHAM.
DULCKEN *v.* CUNNINGHAM.

[1913 C. 1992.]

ASTBURY J.

1913

Dec. 18.

Charity—Bequests to Charitable Society—Construction—Absolute Bequest of Leasehold Home—Annuity to maintain particular Home—Bequests of Life Annuities—Gift over to Residuary Charities after final Expiration of aforesaid Trusts — Voluntary Sale of Home by Society—Maintenance Annuity applicable cy près.

At the time of her will and her death, a testatrix, who held her house under a 999 years' lease, was carrying it on as a home in connection with a charitable society.

By her will dated March 13, 1902, she bequeathed the house to the treasurer and two other members of the society to be used as a home.

She also directed her executors and trustees to hold the proceeds of sale of her residuary estate in trust to pay certain life annuities and to pay the treasurer of the society 120*l.* a year "for the maintenance and expenses of maintaining" the home, and "after the final expiration of the aforesaid trusts" the trustees were to hold the residuary trust funds in trust for certain residuary charities.

On the construction of the will it was clear that these annuities were charged on corpus.

The testatrix died on November 6, 1910, and the society carried on the home for another eighteen months. It was then voluntarily discontinued and sold by the society under the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5, the society having formally decided not to apply for a retaining order under s. 8. The proceeds of sale were applied under a cy près scheme:—

Held, on the construction of the will, that the 120*l.* annuity continued during the 999 years of the lease. It was neither limited to the duration of the home, nor carried into residue for the benefit of the residuary charities on the cesser of the home, but, on the failure of the particular purpose after the testatrix's death, the general charitable intention in favour of the society prevailed, and the annuity was applicable cy près.

Lyons Corporation v. *Advocate-General of Bengal* (1876) 1 App. Cas. 91, 115; *In re Slevin* [1891] 2 Ch. 236; *In re Soley* (1900) 17 Times L. R. 118; and *In re Mann* [1903] 1 Ch. 232, applied.

ORIGINATING SUMMONS.

By her will dated March 13, 1902, Jane Elizabeth Cunningham, of "House Mary Catherine," 13, Adolphus Road, Finsbury Park, after appointing the plaintiff and two other persons her executors and trustees and giving certain legacies, gave to the treasurer for the time being of the Society for the Relief of Clergymen and the Widows and Children of Clergymen within the Cities of London and Westminster and the County of Middlesex (i.e., "The Clergy Widows' Fund," hereinafter called the society), the Archdeacon of Middlesex for the time being, and the Archdeacon of London for the time being as joint tenants, her leasehold messuage "House Mary Catherine" to be used for the widows and orphan daughters (of full age) of the clergy.

She devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion and directed them to stand possessed of the proceeds (after payment thereout of her funeral and testamentary expenses, debts, and legacies) in trust:—

(1.) to pay to her sister Julia (who predeceased her) the annual sum of 50*l.*, payable quarterly during her life;

(2.) to pay to the treasurer for the time being of the aforesaid society for the relief of clergymen and their widows and orphans "for the maintenance and expenses of maintaining 'House Mary Catherine' aforesaid for the widows and orphan daughters (of full age) of the clergy" the annual sum of 120*l.*, payable quarterly;

(3.) to her niece Ethel until her marriage or death the annual sum of 52*l.*, payable weekly, and after her marriage or death to pay the same annual sum of 52*l.* in manner aforesaid to the testatrix's niece Dora until marriage or death, and after the marriage or death of Dora to pay the same annual sum of 52*l.* in manner aforesaid to the testatrix's niece Rose until marriage or death.

And in the event of the income from the residuary trust funds proving more than sufficient to pay the three annuities of 50*l.*, 120*l.*, and 52*l.* aforesaid the testatrix directed her trustees to pay the surplus income not exceeding 52*l.* per annum to Dora until marriage or death. And in the event of there still remaining a surplus income to pay the same not exceeding 52*l.* to Rose until marriage or death. And in the event of there still being a surplus income to pay that surplus income equally between

Ethel, Dora, and Rose until their respective marriages or deaths.

Provided always that should the funds at the trustees' disposal not be sufficient to pay the said annuities numbered (1.), (2.), and (3.) together those funds should be paid and applied in the order set forth in the will, i.e., the funds should not be applied to the second annuity until the first had been fully paid and satisfied and so on in the order set forth as aforesaid.

The testatrix declared that "all such legacies and annuities" should be paid free of legacy or other duties and "after the final expiration of the aforesaid trusts" she directed her trustees to stand possessed of the residuary trust funds in trust for the charitable purposes next thereinafter mentioned, being provisions in favour of certain residuary charities.

The testatrix died on November 6, 1910, and on July 25, 1911, her will and two codicils were proved by the plaintiff alone, the appointment of the second executor having been revoked, and the third having renounced and disclaimed.

The net residuary estate was about 2350*l.* and the income in its present state of investment about 97*l.* When realized and invested in trustee securities the income would be less.

The testatrix had named her residence "House Mary Catherine" in memory of her mother and Mrs. Gladstone. She held it under a lease for 999 years from June 24, 1895, at a ground rent of 2*l.* 10*s.* per annum. At the time of her will she was carrying it on as a home for clergymen's widows and orphan daughters of full age in connection with the society, and in November, 1902, she granted an underlease of the house for the whole term less ten days to the treasurer and archdeacons aforesaid subject to the ground rent and covenants and subject to the reservation of a bedroom and sitting-room for her life. At the same time she was appointed manageress for life. The underlease being void owing to the reservation was not enrolled under the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4. The testatrix continued to reside in the home till her death and provided largely for the cost of its maintenance.

After the testatrix's death on November 6, 1910, the society carried on the home as before until May 27, 1913, when it was sold under the following circumstances. At some time after the expiration of a year from the testatrix's death the Charity Commissioners drew the society's attention to the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), and in the course of subsequent correspondence pointed out that the home must be sold under s. 5 unless a retaining order under s. 8 was obtained. The question of applying for a retaining order was accordingly carefully considered at the annual meeting in March, 1912, and at the subsequent meeting of the committee in June, 1912, it was proposed, seconded, and carried unanimously that the home should be closed and the solicitors instructed to arrange for selling it as soon as possible. The home was subsequently sold on May 27, 1913, for 450*l.*, which was applied under a cy près scheme.

On July 16, 1913, the executor issued this summons to determine whether the 120*l.* annuity was still subsisting or had ceased and determined, and whether if subsisting it was payable out of corpus as well as income.

J. A. Hay, for the executor.

Simpkin, for Ethel. The gifts of the home and the 120*l.* annuity to maintain it as such must obviously be read together: *Attorney-General* v. *Hinxman* (1); *In re Taylor*. (2) It is clear from the language in which this annuity is given and from the gift over "after the final expiration of the aforesaid trusts" that the testatrix intended the 120*l.* annuity to terminate on the cesser of the home. In other words she gave the society the house absolutely and she also gave them an extra benefit while they carried it on as a home. This extra benefit has now ceased. Even if the 120*l.* annuity was intended to continue during the 999 years' lease, the original trusts have expired and it is carried by the express gift over into residue for the benefit of the residuary charities subject to Ethel's 52*l.* annuity. It is not a case of a gift to charity failing after the testatrix's death and falling into residue without any special directions, in which case no doubt the doctrine of cy près would be applicable although the residue is given to charity. The testatrix evidently contemplated

(1) (1820) 2 Jac. & W. 270, 275.

(2) [1888] W. N. 32; 58 L. T. 538.

the very event that has happened, namely, the cesser of the home, and expressly gave the funds over to residue for the benefit of the residuary charities on that event. There is therefore no room for cy près: *Lyons Corporation* v. *Advocate-General of Bengal.* (1)

T. T. Methold, for the residuary charities. The annuities are only payable out of income. The 120*l.* annuity was merely intended for the maintenance of the home as such—*Attorney-General* v. *Whitchurch* (2); *Attorney-General* v. *Hinxman* (3)—and expired when the home ceased: *Clark* v. *Taylor.* (4)

[ASTBURY J. In that case the institution was discontinued during the testator's lifetime, and the gift lapsed accordingly.]

The judgment is not based on that ground. Even if the 120*l.* annuity was intended to last for 999 years it has passed into our residue under the express gift over, subject to the 52*l.* annuity. The sale of the home was purely voluntary, as the society could have obtained a retaining order as a matter of course.

Hon. Frank Russell, K.C., and *R. M. Pattisson*, for the society. The subsidiary annuities are payable out of income but the three main annuities are clearly charged on corpus. No doubt under the law obtaining prior to the Mortmain and Charitable Uses Act, 1891, the bequest of the house would have been void, and the bequest of the 120*l.* annuity to maintain it as a home would have been equally void: *Attorney-General* v. *Whitchurch* (2); *Attorney-General* v. *Hinxman.* (3) Again, if the home had not been in existence at the testatrix's death, the bequest of the 120*l.* annuity would have lapsed: *Clark* v. *Taylor* (4); *In re Rymer.* (5) But the home was in fact carried on for eighteen months after the testatrix's death, so that there was clearly no lapse. The 120*l.* annuity is either given for a term certain, namely, the 999 years of the lease, or in perpetuity In either case it is equivalent to the gift of a lump sum to the society for the maintenance of an existing home, and on the subsequent cesser of the particular purpose the fund is applicable

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(1) 1 App. Cas. 91, 115.
(2) (1796) 3 Ves. 141.
(3) 2 Jac. & W. 270, 275.
(4) (1853) 1 Drew. 642.
(5) [1895] 1 Ch. 19, 31.

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cy près: *In re Soley* (1); *In re Slevin.* (2) The words "after the final expiration of the aforesaid trusts" merely mean "subject to the aforesaid trusts," and there is nothing in the form of the residuary gift to carry the 120*l.* annuity into residue for the benefit of the residuary charities so as to preclude a cy près application.

Austen-Cartmell, for the Attorney-General. The 120*l.* annuity lasts for the 999 years of the lease. The words "after the final expiration of the aforesaid trusts" in the gift over do not refer to the cesser of the home. They refer to the expiration of the life annuities and either to the expiration of the 999 years term or to an earlier expiration of the trusts by capitalization of the fixed term annuity. Whether the home comes to an end by being taken under the compulsory powers of the Lands Clauses Acts or by voluntary abandonment is absolutely immaterial. In either case the fixed term annuity continues and is applicable cy près. In *In re Mann* (3) a testatrix gave 3000*l.* to her trustees for the benefit of an institute belonging to her, but omitted to devise the institute itself specifically, so that it passed to her residuary legatees and devisees and ceased to exist as an institute the moment she died. It was held that the 3000*l.* was applicable cy près. In the present case the house and the 120*l.* annuity were both given for the same particular purpose, namely, the continuance of the house as a home. It could not have been contended that the cesser of the home put an end to the gift of the house, and in fact the 450*l.* purchase-money is already being administered under a cy près scheme. Surely the same result must follow with regard to the 120*l.* annuity, which is inseparably connected with the gift of the house.

Simpkin in reply. In *In re Mann* (3) there was an overriding general charitable intention for the inhabitants of the village where the institute was situated: Tudor on Charities, 4th ed. p. 106. In the present case there is nothing of the sort. The 120*l.* annuity is merely given for the maintenance of the home, and for nothing else. As soon as the home was definitely given up the annuity either ceased or was caught by the express gift over to the residuary charities, and on either construction Ethel is now entitled to the 52*l.* annuity.

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(1) 17 Times L. R. 118.

(2) [1891] 2 Ch. 236, 239.

(3) [1903] 1 Ch. 232, 234.

Astbury J. (after stating the facts). The question now is whether the 120*l.* annuity has ceased to be payable, or, on the other hand, whether it must be applied cy près on the ground that the testatrix has shewn a sufficient general charitable intention in that behalf.

Before I decide this question there is the preliminary matter as to whether this annuity is a charge on corpus or not. I think it clearly is. The testatrix directed the whole of her residue to stand in the hands of her trustees upon trust to pay these three several annuities. The income direction is only in the event of there being surplus income, which was not the case, and the provision as to the order in which those annuities are to be paid clearly refers to the whole of the funds at the disposal of her trustees.

It has been contended that this is a terminable annuity and that it is only payable and charged on the testatrix's estate if and so long as this society is in fact maintaining and expending money in maintaining this home, or, in other words, so long as this home is continued as an operative part of the charity. On the other hand it is contended that there is a sufficient general charitable intention to benefit this particular society, and that the words "for the maintenance and expenses of maintaining" the home are not sufficient to cut down the vested charitable gift in this annuity, and that the cy près doctrine ought to apply.

On the first point I have been referred to a number of authorities which I do not think I need refer to in any detail. They are all cases, of which *Attorney-General* v. *Whitchurch* (1) is an instance, where a testator had left property for the purposes of some particular defined charitable trust which trust was in fact invalid, and therefore the gift of the money for that particular purpose was held not to have been validly disposed of. In *Lyons Corporation* v. *Advocate-General of Bengal* (2) a question arose whether the cy près doctrine is applicable or not where the residuary bequest is also to a charity. It was held to make no difference, and the judgment of the Privy Council contains this sentence: "Their Lordships, therefore, are brought to the conclusion that the jurisdiction of the Court to act on the cy près doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue."

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(1) 3 Ves. 141.

(2) 1 App. Cas. 91, 115.

Now I think there is a great deal to be said in favour of the view that on the true construction of this will the annuity was intended by the testatrix to be limited to such period as this home was in fact maintained and carried on, and in support of that not only are there the words in the gift of the annuity itself, but in the gift over the testatrix after referring to these three annuities has used the expression "after the final expiration of the aforesaid trusts."

It has been contended that this means that after the final expiration of the aforesaid trusts, including (inter alia) the payment of this 120*l.* annuity, the property subject to it is to go over. But having regard to the fact that the annuities are charged upon corpus and that two of them are given to individuals who may at any time cease to exist, I think that the true meaning of the expression "after the final expiration of the aforesaid trusts" is after the trusts either by death or marriage of the personal annuitants or by lapse of time or capitalization of the fixed term annuity have ceased to operate upon the balance of the estate (if any), and then such estate can be treated and dealt with as the testatrix has subsequently directed.

On the question as to whether there is a sufficiently general indication of charity in favour of this institution I think there are one or two important decisions which bear upon it.

In the first place, in *In re Soley* (1), in which the facts were very different, the testator bequeathed money to trustees to pay the income to a person for life and after his death the money was to be given to the Drapers' Company for the benefit of a particular school. The testator died and this gift to the Drapers' Company became a vested gift, they then continuing to carry on the school after the testator's death, but during the life tenant's lifetime the school ceased to exist, and Byrne J. held first that there was no lapse, and secondly that the fund must be applied cy près.

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(1) 17 Times L. R. 118.

The decision of Byrne J. was based on a judgment of the Court of Appeal in *In re Slevin* (1), where the gift was again of a legacy (as distinct from an annuity) to a particular orphanage, and this orphanage was in existence at the date of the testator's death, although it very shortly thereafter ceased to exist. The Court of Appeal in a judgment delivered by Kay L.J. said: "This case raises a question which seems only to have occurred in two instances in the books, namely, whether a charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid over, fails for the benefit of the residuary legatee, as in the case of a lapse. Properly speaking, a lapse can only occur by failure of the object in the lifetime of the testator; but it is possible that a will might be so framed as that a subsequent failure of the object of the charitable gift might occasion a resulting trust for the benefit of the testator's estate. We have not been referred to any such case, nor have we found any." Then the learned judge goes on to decide that, this being a vested gift at the death of the testator, the fact that a particular home ceased to exist could not and did not divest that gift.

In the present case the question is whether the fact that this is an annuity and the particular language used by the testatrix are sufficient to defeat the testatrix's apparent object of benefiting this charitable society by the gift to them of the house and the annuity.

On this point I will only refer to one other authority, *In re Mann* (2), the facts of which again were entirely different. In that case the testatrix gave 3000*l.* to trustees to be applied at their discretion for the benefit of what she described as the Mann Institute. This institute had been erected by her, but it had never been conveyed to trustees and no charitable trust had been created, and in fact the property on which the institute was carried on during her lifetime passed in consequence of these facts to her residuary legatees and devisees at the time of her

(1) [1891] 2 Ch. 236, 239. (2) [1903] 1 Ch. 232, 234.

death. It was held nevertheless that the 3000*l.* was a good charitable gift. Farwell J. said: "Now I have to decide this question on the assumption that the testatrix did not convey the land on which the institute stood in a mode sufficient to satisfy the Statute of Frauds or the Mortmain Acts, for that question is not raised on the summons. Assuming, therefore, that this institute used, as stated in the affidavits, during the testatrix's life, could no longer be so used against the will of her residuary legatees after her death, I find that she has by her will given 3000*l.* to trustees to be applied by them in such manner as they may consider most expedient for the benefit of the Mann Institute in Moreton-in-Marsh. Mr. Tyssen argued that that was for the building only, but I cannot adopt that construction. That is too narrow a view. I think it is for the purposes for which the Mann Institute was founded—that is to say, for the benefit of the inhabitants. Now that is a charitable purpose; and the two particular modes in which the building was used during the testatrix's lifetime, namely, for a working men's club, and for a hall and gallery for concerts, lectures, and other meetings, were both public purposes for the benefit of the inhabitants, not inconsistent with the general charitable intention which I have already inferred."

That is a distinct authority, and there are others in the books, that the mere fact that a gift obviously intended to be charitable cannot be applied for the specific purpose referred to by the testatrix is in itself insufficient to prevent the general charitable intention prevailing. The only question really upon this summons which involves any difficulty at all is whether, this being an annuity and the testatrix having said that it is to be paid to the society for the maintenance and expenses of maintaining this home, a gift over on the final expiration of the trust to pay that annuity is a sufficiently clear indication that this charitable intention is to cease to operate if for any reason at all this home cannot be continued. It seems to me quite clear that if the home ceased to be continued as part of this trust by reason of its having been taken over compulsorily under the Lands Clauses Consolidation Act, 1845, or under any compulsory powers of that nature, the testatrix's intention would not be defeated, and the only remaining matter is whether, having regard to the fact that the society itself has not thought fit or been able to apply for permission under the Mortmain and Charitable Uses Act, 1891, to continue this home, the gift over operates in respect of this fund. Now it is to be observed that the testatrix gives the house absolutely to the society and this annuity is connected with the gift of this leasehold house, and taking the two gifts together I think on the whole, although there is some doubt about it on the language, that the testatrix herself has sufficiently indicated her intention to give an annuity charged upon capital for the benefit of this society, and that if they cannot apply the annuity in the precise way indicated by the testatrix that is not sufficient to deprive this gift of its general charitable nature.

Austen-Cartmell. The estate is obviously insufficient to provide the 120*l.* annuity for 999 years. It had better be realized and paid to the society on their undertaking to apply for a scheme.

Simpkin. The estate should be retained and the income and corpus applied de anno in annum in payment of the 120*l.* and 52*l.* annuities as the testatrix intended.

ASTBURY J. That is not what she said. Under the priority clause the 120*l.* annuity for the full period must be secured before the 52*l.* annuity is payable. The 120*l.* annuity will more than exhaust the estate. The estate may therefore be realized and paid to the society on their undertaking to apply for a scheme.

Solicitors: *F. Shirley Turner; G. Houghton & Sons; Nisbet, Daw & Nisbet; Parker & Thomas; Treasury Solicitor.*

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EVE J.

Jan. 22, 23, 24; Feb. 7.

C. A.

Oct. 23.

MITCHELL v. MOSLEY.

[1911 M. 1273.]

Deed — Construction — Mines and Minerals — Title — Lease — Conveyance of Reversion—Severance—Rent—Apportionment—Statute of Limitations—Real Property Limitation Act, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 9.

In 1740 the defendant's predecessors in title granted to the predecessors of the B. colliery company a lease of the coal and cannel under certain lands for a term of 200 years at a rent of 50*l.* for such coal or cannel as should be raised by ten getters, and proportionately after that rate for any additional number of getters. By two indentures dated in 1791 the defendant's predecessors in title assured to the predecessors in title of the plaintiff portions of the land to which the minerals comprised in the lease of 1740 were subjacent. Neither of these indentures contained any exception of mines or minerals, and no mention of the lease of 1740 was made in either of them, except in the vendor's covenant against incumbrances, from the operation of which it was excepted. In 1828 part of the land comprised in the indentures of 1791 was conveyed back to the defendant's then predecessor in title, and in exchange therefor he granted to the plaintiff's then predecessors certain other lands to which minerals comprised in the lease of 1740 were subjacent. In this deed there was again no exception of mines or minerals, but the grant was made subject to the lease of the coal mines then vested in the B. colliery company. The defendant, who was the successor in title of the original grantors of the lease of 1740, received during his tenure of the property the whole of the rents paid by the colliery company under the lease.

In an action by the plaintiff, as tenant for life of the lands comprised in the indentures of 1791 and 1828, claiming a declaration that she was entitled for life to the mines and minerals thereunder subject to the lease of 1740, and to have an account taken of her proportion of the rents received by the defendant from the B. colliery company, the defendant contended (1.) that the reversion of the minerals demised by the lease of 1740 was not comprised in the various conveyances of 1791 and 1828 or any of them; (2.) that the rent reserved by the lease was not apportionable; and (3.) that the plaintiff's claim was barred by s. 9 of the Real Property Limitation Act, 1833:—

Held by the Court of Appeal, affirming the decision of Eve J., (1.) that the reversion of the minerals expectant on the termination of the lease was not excepted from the conveyances of 1791 and 1828; (2.) that the reversion was severed by each of those conveyances, and that on each such severance the rent reserved by the lease became apportionable; (3.) that the rent was a dead rent and not a royalty, and that, inasmuch as there had never been any wrongful receipt by the defendant or his predecessors of the rent, time had never begun to run under s. 9 of the Act of 1833.

Held, therefore, that the plaintiff was entitled to recover her proper proportion of the rents received by the defendant limited to six years before the commencement of the action.

Laybourn v. *Gridley* (1892) 61 L. J. (Ch.) 352 is not inconsistent with *Williams* v. *Pott* (1871) L. R. 12 Eq. 149.

WITNESS ACTION.

By a lease dated October 21, 1740, made between Sir Oswald Mosley and Oswald Mosley his son (the lessors and predecessors in title of the defendant) and John Seddon, of Manchester, the lessors demised and leased to John Seddon, his executors, administrators, and assigns, all and every the mines, veins, seams and beds of coal, and cannel which then or thereafter, during the demised term, could or might be found, raised, or gotten in or out of all and every of the closes, fields, lands, commons, or waste lands, situate within the township of Manchester, then belonging to the lessors, with full and absolute power, licence, and authority to the lessee, his executors, administrators, and assigns, during such demised term, to search for and open all such mines, and the coal and cannel so discovered and raised to take and carry away for his or their own proper use; to have and to hold the premises thereby granted or demised unto John Seddon, his executors, administrators, and assigns, from the date thereof for and during the term of 200 years under and upon payment of the yearly rent and performance of the conditions and agreements thereinafter mentioned, that was to say, that he, the said John Seddon, covenanted for himself, his executors, administrators, and assigns, with the lessors, that he, his executors, administrators, and assigns, would yearly and every year, so long as he or they should make use of the said mines for getting coals within the demised premises, pay to the lessors the yearly rent of 4*l.* on the days therein mentioned by equal portions for every acre of land or ground, and proportionably for a greater or lesser quantity which should be made use of for pits or roads, &c., and until such time as John Seddon, his executors, administrators, and assigns, should have given notice to the lessors that the works were so far perfected as that coals or cannel might be effectually got, and from and after such notice so given to pay the yearly rent or sum of 50*l.* upon the aforesaid rent days for such coals or cannel as should be raised or got within the demised premises by ten getters, and proportionably after that rate for any additional number of getters which should be employed in such works over and above ten getters; and it was also agreed that if the lessee should, by negligence, misfortune, or any other accident, fail in the number of ten getters daily in any week, or in any part of a week, then such deficiency might be made up and supplied in the then next or some other following week without being charged with any additional rent.

By two several indentures, both dated June 24, 1791, the predecessors in title of the defendant bargained, sold, released, and confirmed to the predecessors in title of the plaintiff, then in actual possession, several pieces of land therein mentioned, situated in Cleydon, within the parish of Manchester (being part of the land subject to the lease of October 21, 1740), containing in the whole 10½ acres or thereabouts, except and reserved to the defendant's predecessors a sluice, watercourse, or aqueduct therein described, together with free liberty to enter upon the premises and repair or widen the sluice, watercourse, or aqueduct, and all houses, buildings, ways, watercourses, liberties, easements, &c., to the premises appertaining; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits, of all and singular the premises mentioned to be thereby released, and all the estate, right, title, and interest of the defendant's predecessors in title, yielding and paying yearly rents of 76*l.* 8*s.* and 80*l.* 3*s.* 3*d.*, and also yielding and paying to the vendors one clear fifth part of the value of all the ironstone or ore which should at any time thereafter be worked, raised, or taken from the premises thereby conveyed. Among other covenants, the defendant's predecessors covenanted for quiet enjoyment on payment of the respective rents, including the rent for the ironstone, clear of all former grants by the defendant's predecessors, save and except the lease of October 21, 1740, granted to John Seddon, of Manchester, of the coal under the estates of the defendant's predecessors for the term of

200 years. No other mention of this lease was made in the two deeds of June 24, 1791, except as last stated.

By an indenture of exchange, dated June 26, 1828, part of the land comprised in the two assurances of 1791 was conveyed back to the defendant's then predecessors in title, and in exchange therefor, and in consideration of the payment to them of a sum of money, they granted and released to the plaintiff's then predecessors in title two other pieces of land adjoining the lands retained by the grantees and containing in the aggregate some 13,700 square yards. In this deed there was again no exception of mines or minerals, but the grant was made in terms subject to the lease of the coal mines in 1740, the interest of which was then vested in the Bradfield Colliery Company, who were working the mines. This company was not a party to the action. On February 16, 1909, the Bradfield Colliery Company surrendered the lease of 1740 to the defendant, who granted them a new lease of all the mines comprised in the lease of 1740 which were then unworked, and the Bradfield Colliery Company continued to pay to the defendant the whole rent under the new lease.

The plaintiff, Anna Mitchell, commenced this action on May 18, 1911, and claimed to be entitled, as tenant for life of the premises comprised in the assurances of 1791 and 1828, to the mines and minerals under all the premises, subject as to the veins of coal and cannel to the lease of 1740, and an account, and payment to her of the proportion of the rents received by the defendant from the Bradfield Colliery Company. The defendant denied the plaintiff's title to the lands comprised in the two indentures of June 24, 1791, and the lands exchanged by the deed of June 26, 1828, and that the reversion in the premises leased in 1740 was now vested in her, entitling her to a proportion of the rents under that lease. They further pleaded that there was no principle stated by the plaintiff on which an apportionment of rent could be ascertained, and alleged that the claim was barred by the Real Property Limitation Acts, 1833 and 1874.

The action came on for hearing before Eve J. on January 22, 1913.

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P. O. Lawrence, K.C., and *MacSwinney*, for the plaintiff. Under the deeds, which passed the minerals, the reversions were conveyed. On the severance of the reversion, the rent becomes apportionable, if not by the deed, then by the Court, as between the reversioners: Co. Litt., 148a (*g*), s. 222; *West* v. *Lassels* (1); Gilbert on Rents, 172. Necessity for the attornment of the tenants was done away with by s. 9 of 4 & 5 Anne, c. 16. Sect. 10 has an important bearing on the Statute of Limitations, and has been held to prevent the statute running. Apportionment does not bind the lessee without his consent: *Bliss* v. *Collins*. (2) The covenant for payment of rent is divisible also: *Swansea Corporation* v. *Thomas*. (3) The plaintiff's remedy is still in existence: *Baynton* v. *Morgan*. (4) The last two cases would be more germane if the plaintiff were suing the lessees. If she were, there is privity of contract.

As to the effect of the lease of 1740, no case of apportionment of the rent reserved thereon has ever arisen. The rent was a sliding, not a dead, rent.

The Statute of Limitations, assuming that in 1791 the plaintiffs were entitled to an apportionment, cannot be successfully pleaded: *Laybourn* v. *Gridley* (5); Halsbury's Laws of England, vol. xix., p. 129, § 243. The rent was being received for the plaintiff quite rightly up to the surrender in 1909, which was only two years before action brought. It was not received by a "person wrongfully claiming" under s. 9 of the Real Property Limitation Act, 1833.

Jessel, K.C., and *St. John Clerke*, for the defendant. This is an unheard of action by one reversioner against another on the ground that his tenant has paid rent to that other.

[*P. O. Lawrence, K.C.*, referred to *Gledhill* v. *Hunter*. (6)]

That has reference to the case of the defendant being a trustee for, or in some fiduciary relation to, the plaintiff. The plaintiff has been arguing on the basis that the payment of the rent to the defendant, there having been no apportionment, was a perfectly proper payment. If there is a mistake in payment to a wrong person, that person immediately becomes a trustee. But here there was no mistake, and the person to be sued is the tenant. The defendant's receipt of the rent was perfectly proper, and the action fails on that ground.

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(1) (1601) Cro. Eliz. 851.
(2) (1822) 5 B. & Al. 876.
(3) (1882) 10 Q. B. D. 48.
(4) (1888) 22 Q. B. D. 74.
(5) 61 L. J. (Ch.) 352.
(6) (1880) 14 Ch. D. 492.

Upon the construction of the lease of 1740 our contention is that the rent of 50*l.* is a minimum rent based on there being a fixed number of ten getters. If the plaintiff's view is correct, it follows that if only nine getters were employed no rent at all would be payable. The rent is not of an apportionable value, and only that rent which is of an apportionable value can be apportioned. Where it is a chattel it cannot be apportioned: Co. Litt., 147b, s. 222, 149a, s. 223. The difficulties of apportionment here would be enormous: *Salts* v. *Battersby* (1); *Ewer* v. *Moyle* (2); *Smith* v. *Malings.* (3)

Further, the action has not been commenced in time within twelve years from the time when the right first accrued. The case comes within s. 2 of the Real Property Limitation Act, 1833, and if not within that section, then within s. 9 of the Act. (4)

P. O. Lawrence, K.C., in reply. The apportionment may be difficult, but that will not deter the Court from making it. The rent is really a royalty on the coal gotten.

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(1) [1910] 2 K. B. 155.

(2) (1599) Cro. Eliz. 771.

(3) (1607) Cro. Jac. 160.

(4) The Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), enacted as follows:—

Sect. 9: "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

The rent here was rightfully received, and the defendant's right, if any, arises under s. 9 of the Real Property Limitation Act, 1833. It is that, or nothing.

Cur. adv. vult.

Feb. 7. EVE J., after stating the effect of the lease of 1740, the two indentures of 1791, and the deed of exchange of 1828, continued: The plaintiff, whose title as tenant for life of the premises comprised in the assurances of 1791, except in so far as they were exchanged for the premises assured to her predecessors in 1828, and of the last mentioned premises, has been proved in the action, claims a declaration that she is entitled for life to the mines and minerals under all the premises, subject, as to the coal and cannel, to the lease of 1740.

The defendant repudiates the plaintiff's claim so far as it relates to coal and cannel, and alleges, first, that the reversion of the minerals demised by the lease was not comprised in or assured by the indentures of 1791 and 1828, or any of them.

In my opinion, the defendant fails in this contention. I do not think there were any circumstances subsisting at the date of the several assurances from which any intention to except therefrom the reversion expectant on the determination of the lease ought to be implied, nor do I think that the assurances themselves, or the fact that the transactions were carried out by lease and release, necessarily raise such an implication. In this latter connection it is to be noted that the deeds of 1791 both contain an express reservation to the releasors of a sluice and certain watercourses, with full and free liberty to enter and repair the same; that the leases for a year and the releases in terms include the reversion and reversions, yearly and other rents, issues, and profits of the premises thereby leased and released; that, as already observed, a rent is reserved of one clear fifth part of the value of all the ironstone or ore, wrought, got, raised, or taken away, payable half-yearly; and finally, that although the reversion expectant on the lease might have been assured by grant, the assurance by way of lease and release was applied with equal reason and with equal security in conveying lands held for an estate in possession and lands held for an estate in reversion. (See Preston on Conveyancing, 3rd ed. vol. ii. p. 232; see also Burton on Real Property, 6th ed. p. 51.)

There was, therefore, a severance of the reversion as to part of the lands, of which the plaintiff is tenant for life, in 1791, and as to the rest in 1828, and, prima facie, on each such severance the rent reserved by the lease became apportionable—Co. Litt., 148a, s. 222; *West* v. *Lassels* (1)—and as at the respective dates of severance: *Salts* v. *Battersby*. (2)

I say "prima facie" because the defendant raises, by way of further defence to the action, the point that the rent reserved by the lease of 1740 is not of an apportionable nature.

I do not think there is any substance in this defence. The rent reserved is money, the quantum of which is to be ascertained in a particular manner, and although the particular manner stipulated for may be one which makes the ascertainment of the proper apportionment a matter of some difficulty, it is, I think, fallacious to argue from this that the difficulty of apportionment can really alter the character of the rent. It is, in my opinion, an apportionable rent.

The defendant finally relies on s. 9 of the Real Property Limitation Act, 1833, as an answer to the plaintiff's claim. On this point it is necessary to ascertain how the rent reserved by the lease is to be ascertained. There is no reddendum in the lease, but the habendum is to the lessee, his executors, administrators, and assigns, "under and upon payment of the yearly rent, and performance of other the payments, terms, conditions, and agreements hereinafter particularly mentioned," and then the lessee covenants, for himself, his executors, administrators, and assigns, so long as he or they shall make use of the mines for the getting of coals, to pay the yearly rent of 4*l.* by equal half-yearly payments, on the days therein mentioned, for every acre of surface land, and proportionately for a greater or lesser quantity used either for pits, or roads, or the banking or laying of coals, or cannel, or any other materials, and further, after he shall have given notice to the lessors "that the works are so far perfected as that coal or cannel may be effectually got," to pay the yearly rent or sum of 50*l.* half-yearly "for such coal or cannel as shall be raised or got within the said demised premises by ten getters, and proportionably after that rate for any additional number of getters which shall be employed in such works over and above ten getters"; and it was thereby further agreed that if the lessee should at any time, by negligence, misfortune, or any other accident, fail in the number of ten getters daily in any week, or in any part of a week, then such deficiency might be made up and supplied in the then next or some other following week, without his being charged with or subject to any additional rent; and a provision follows for checking from week to week the number of getters actually at work.

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(1) Cro. Eliz. 851.

(2) [1910] 2 K. B. 155.

The question arises under the covenant for payment of the 50*l.* and any additional sum, whether the 50*l.* is in the nature of a minimum dead rent, payable whether coal is raised or not, or whether it and all other sums payable under the covenant are not royalties, payable only, so far as the 50*l.* is concerned, when coal raisable by ten getters has been actually brought to bank.

If the 50*l.* is a royalty it is payment for coal gotten as and when it is in fact gotten, and s. 9 of the Act of 1833 is no answer to the plaintiff's claim to royalties payable in respect of coal raised from under her land during the last six years. If, on the other hand, the 50*l.* is in the nature of a minimum dead rent, then the defendant argues that inasmuch as this rent became apportionable at the date of the severance of the reversion, and he and his predecessors have been in receipt of the whole of the amount ever since, the plaintiff's claim to any part of this rent is now effectually barred by s. 9.

I have felt some doubt as to the true character of the 50*l.*, but, on the whole, have come to the conclusion that it is in the nature of a dead rent. To accept the other alternative and to treat it as royalty would, as it seems to me, leave it open for the lessee to escape all payment under the covenant by constantly employing less than ten getters, and, further, such a construction would not, I think, satisfactorily explain the insertion of the provisions in the lessee's favour as to making up antecedent shortages of labour in subsequent weeks.

This being so, it is necessary to consider whether the case falls within the section referred to.

The section is in these terms: [His Lordship read s. 9 of the Act, and continued.] It was argued on behalf of the plaintiff, first, that the defendant has not brought the case within the section because he has not proved that the plaintiff's apportioned share of the rent would amount to the yearly sum of 20*s*. I do not think that this is the true construction of the section. It applies, I think, to all cases where the rent reserved by the lease amounts to 20*s*. and upwards, and I do not see anything which would warrant me in holding that, in a case of severance, it is obligatory on the person who has in fact received the rent to prove that the apportioned share of the claimant exceeds 20*s*. before he can avail himself of the section. But, on the facts and on the authorities as they stand, I see no answer to the plaintiff's main contention that there has never yet been any wrongful receipt by the defendant or his predecessors of the rent, and therefore that time has never begun to run under the section. The severance of the reversion in 1791 and 1828 did not apportion the rent, and it has in fact never been legally apportioned. No notice of severance was given to the lessee, and, in these circumstances, the continued payment of rent by him to one of the reversioners was a good payment made to a person entitled to receive it and for which, therefore, he obtained a valid receipt and discharge (4 & 5 Anne, c. 16, ss. 9 and 10). There was, therefore, never any payment to or receipt by the wrong person, and the condition of things which would have brought s. 9 into operation never existed.

The result is that in my opinion the defence fails on all points. I must make a declaration of the plaintiff's title to the minerals under the lands in question, refer it to chambers to ascertain her proper proportion of the rent reserved by the lease, and, if necessary, direct an account of what is due to her on the footing of the apportionment certified for a period extending back to a date six years before the issue of the writ. The defendant must pay the costs down to and including this judgment, and the subsequent costs are reserved.

G. M.

From this decision the defendant appealed. The appeal was heard on October 23, 1913.

Jessel, K.C., and *St. John Clerke*, for the appellant. There is no absolute rule that the reversion under a lease of minerals passes with a conveyance of the surface.

The rent created by the lease of 1740 is such that it cannot be presumed that it was intended to be apportioned upon a severance of the reversion. It is extremely improbable that there was any intention on the part of the grantors in 1791 and 1828 to convey any interest in the mines. There was no intention to convey anything but the surface. No such intention will be presumed: *Duke of Sutherland* v. *Heathcote.* (1) The rule that minerals pass unless excepted does not apply where there has already been a virtual sale of the minerals. The deeds do not shew any intention to include in the conveyance of the lands the reversion expectant upon the lease of 1740. The grant should be construed as if the minerals were excepted.

On the question of apportionment it is submitted that the rent reserved by the lease of 1740 was not of an apportionable nature, and that the account directed by Eve J. could not be taken without great difficulty. The rights of the parties depend upon the values of the severed portions of the property at the date of the severance: *Hartley* v. *Maddocks* (2); *Salts* v. *Battersby.* (3) To apply that here would be to work injustice.

Here there has been no apportionment. Having regard to the statute 4 & 5 Anne, c. 16, ss. 9 and 10, no attornment was necessary, and no notice of severance was given to the lessees. As between the lessees and the owners of the severed portions of the reversion the rent must be ascertained by a jury.

Further we submit that the action is barred by virtue of s. 9 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27).

[PHILLIMORE L.J. That section does not help you. The rents were properly paid to the defendant or his predecessors in title, but they were not entitled to retain the whole of them. Of course the right to recover more than six years' arrears is barred.]

(1) [1892] 1 Ch. 475. (2) [1899] 2 Ch. 199.
(3) [1910] 2 K. B. 155.

Laybourn v. *Gridley* (1) is not consistent with *Williams* v. *Pott*. (2) The latter case ought to be preferred.

[COZENS-HARDY M.R. I do not think that case applies here.]

The rule by which a conveyance of land must be held to pass the minerals thereunder, unless expressly excepted, does not apply where there is an existing lease of the minerals.

P. O. Lawrence, K.C., and *MacSwinney*, for the respondents, were not called upon.

COZENS-HARDY M.R. We will not trouble you, Mr. Lawrence. This is an appeal from a decision of Eve J. raising, no doubt, a question of importance to the parties, but having heard the argument on behalf of the appellant, I cannot feel any doubt that the conclusion of Eve J. was perfectly right.

In 1740 what is spoken of as a mineral lease for a term of 200 years was granted. It was a lease of the coal and cannel under what is now a considerable part of Manchester. The rent was a yearly small surface rent, if and when surface was taken, and the mineral rent was calculated in what may have been then the usual mode, but which, according to my experience, is certainly not now the usual mode. It was calculated according to the number of coal getters who were employed in the mine. It was a mining lease for 200 years, reserving rents. In 1791 and again in 1828 conveyances were executed by the Mosleys, who were the successors of the original freeholders or grantors of the lease, to the Mitchells, the predecessors in title of the plaintiff. The assurances of 1791 were not expressed to be subject to the mining lease, but the second conveyance in 1828 was expressed to be so subject. In neither case was there any apportionment of the rent reserved by the lease of 1740 as between the severed parts of the reversion. No step has been taken during all the years that have since elapsed to effect any apportionment of the rent as between the lessors and the owners of the severed parts of the reversion. The whole rent has been received by the Mosleys, and this is an action by the plaintiff as successor of the Mitchells claiming, not as against the lessees, but as against the

(1) 61 L. J. (Ch.) 352.

(2) L. R. 12 Eq. 149.

defendant as successor of the Mosleys, on this footing: It is said that the reversion has been severed: the rent payable ought as between the plaintiff and the defendant to be ascertained and apportioned, and the plaintiff ought to have from the defendant as money had and received to the plaintiff's use the proper proportionate part of the rent as between the parties. The two answers which are sought to be made to that claim may, I think, be shortly and not unfairly stated in this way: Is it likely, it is said, that in 1791 and again in 1828, when the property was conveyed, that the parties contemplated any apportionment of rent between the owners of the severed parts of the reversion when they did not mention it at all? Is not the fair conclusion that the conveyances, though in form they are conveyances of the land and of land which is subject to a mining lease, really ought to be construed as merely conveyances of the surface? The appellant's counsel were not quite sure whether they would admit that any right to the minerals passed on the expiration of the term.

In my opinion we should be going contrary to perfectly well settled principles of law if we were to allow for a moment any doubt to arise on the construction of those two conveyances, which alone we must look at. We can have no doubt as to their meaning and effect. It seems to me quite clear that they are conveyances of everything—conveyances of the land which include (unless you can find something to the contrary) everything down to the centre of the earth. The grant of the land includes the surface and all that is supra—houses, trees, and the like—cujus est solum ejus est usque ad caelum—and all that is infra, i.e., mines, earth, clay, &c. It is, however, within the right of the lessees to get the coal and cannel during the term. Subject to that right, so far as it can be and is exercised by the lessees under the lease, it is to my mind quite clear as a matter of construction of the conveyances that not merely the surface rights but the whole substratum to the centre of the earth, even including the vacant spaces from which during the term the coal may have been worked out by the lessees—all that passed by the conveyances to the Mitchells. It is said, however, that the parties never contemplated the apportionment of this rent. I daresay they did not, but the law provides for that. As a matter of law when the reversion is severed there are rights which arise between the owners of the severed parts. If the owner of one part receives the whole rent he is liable to be sued by the other for money had and received in respect of his proportion of the rent. But then it is said that there has been no apportionment, that having regard to the statute of Anne no attornment was necessary and no notice was given to the lessees, and that as between the lessees and any one of the owners of the severed parts of the reversion the rent must be ascertained by a jury. The answer is that the action does not seek to effect any apportionment as between the lessees and the owners of the severed parts; it proceeds upon the footing that as between the two owners of the different parts of the reversion certain rights have to be ascertained having regard to the value of the property granted away at the date of the severance. Having ascertained that, all the rest is easy. The Mosleys have received from the lessees rent which as between the Mosleys and the Mitchells ought in part to have been paid to the Mitchells, and the Mitchells can recover the proper part whatever it may be. Then it is said that the Statute of Limitations is an answer—that the case comes within s. 9 of the Real Property Limitation Act, 1833.

The decision of North J. in *Laybourn* v. *Gridley* (1) deals exactly with that point; and I have not the smallest doubt that that decision is perfectly right. It is in no way inconsistent or at variance with that of Lord Romilly in *Williams* v. *Pott* (2), and I think I should be needlessly taking up the time of the Court if I were in any way to attempt to emphasize the proposition, which is simply this: Who were the persons who, as matters now stand, could sue the lessees? The Mosleys and nobody else. They as between themselves and the lessees have properly received the whole of the rent, and it is on that supposition that the action is framed. That being so, the language of s. 9 of the Statute of Limitations obviously has no application.

In my opinion the judgment of Eve J., for the reasons he gave, was perfectly right, and this appeal fails.

(1) 61 L. J. (Ch.) 352.

(2) L. R. 12 Eq. 149.

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Swinfen Eady L.J. I concur in the judgment which the Master of the Rolls has just pronounced. Eve J. properly decided this case, and upon the right grounds. The contention really is this, that having regard to the difficulty of apportioning the rent it could not have been intended, by the conveyances of 1791 and 1828, that the minerals should pass, or at all events that the minerals should pass for the residue of the term. Now there will be some difficulty in working out the apportionment, but the mere difficulty of apportioning the rents does not preclude the minerals from passing. Suppose the conveyances had been expressed: "Together with the mines and minerals subject to the lease but with the benefit of the rent thereby reserved." However difficult the apportionment might be, there could be no question that the mines and minerals would pass. There is nothing upon the face of these deeds to except the minerals. In my opinion the minerals passed by both these conveyances. The Master of the Rolls has already disposed of the question upon the Statute of Limitations. There has been no wrongful possession here. It is not suggested that the grantee of a part of the severed reversion gave any notice under the statute of Anne, and there has been no legal apportionment. The position is that this action is really an action for money had and received. It is limited to six years before the commencement of the proceedings. It is an action to recover the plaintiff's share of the money received by the defendant during the six years before action in respect of rent. There has been no wrongful possession whatever to bring the case within s. 9 of the Real Property Limitation Act. The rent has been paid by the lessees to the persons entitled to receive it. Under these circumstances I am of opinion that this appeal fails.

Phillimore L.J. I agree with the decision of the rest of the Court and with the judgment of Eve J. in the Court below. Very powerful arguments have been addressed to us by counsel for the appellant to shew the inconvenience of our having to construe these deeds in the way we are construing them. They are not, however, to my mind sufficiently powerful to enable us to disregard the recognized rule of law which governs the construction of conveyances of this nature.

Solicitors: *Kirby, Millett & Ayscough; Robbins & Co., for Slater, Heelis & Co., Manchester.*

G. A. S.

MANCHESTER SHIP CANAL COMPANY *v.* HORLOCK.

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Dec. 10, 11, 15, 19.

[1913 M. 1587.]

Shipping—Registered Ship—Sunk in Fairway of Canal—Sale—Contract in print, altered in writing—How to be read—Transfer—" Constructive loss"—Closing of Register—Merchant Shipping Act, 1894 (57 & 58 *Vict.* c. 60), *s.* 21, *sub-s.* 1; *ss.* 24, 530 (*a*), (*c*)—*Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 60—*Merchant Shipping Act,* 1906 (6 *Edw.* 7, *c.* 48), *s.* 52, *sub-s.* 1.

A contract of sale of a registered ship contained, in print, a clause that " on completion of the purchase the seller will deliver to the purchaser a legal bill of sale of the vessel " with the words " legal bill of sale of " struck out but legible and the words " delivery order for " substituted in writing for them:—

Held, that the document must be read as written out afresh with the struck out words omitted and the substituted words inserted, and that the express term that the seller would deliver a delivery order for the vessel did not relieve him from the implied obligation to transfer the ship by bill of sale in accordance with s. 24 of the Merchant Shipping Act, 1894.

Semble, a ship may be a " constructive total loss " within the meaning of s. 60 of the Marine Insurance Act, 1906, without being " actually or constructively lost " within the meaning of s. 21 of the Merchant Shipping Act, 1894.

The power of sale given by s. 530 of the Merchant Shipping Act, 1894, carries with it, when exercised in relation to a registered ship, a power to transfer by statutory bill of sale, free and discharged from incumbrances.

On May 1, at a sale by auction by the Manchester Ship Canal Company, exercising their powers under s. 530 of the Merchant Shipping Act, 1894, a registered ship, which they had raised and removed to the pontoon at Manchester after she had been sunk in the fairway on March 22, was knocked down to the defendant, who paid a deposit and signed a contract containing a clause that on completion of the purchase the company would deliver to him a delivery order for the vessel. No steps had then been taken to close the register. On May 8, the day fixed for completion, the purchaser attended with the balance of the purchase-money, but, as he insisted that he was entitled to have the ship transferred to him by bill of sale and the company insisted that he was bound to complete on receiving a delivery order only, he refused to complete. On May 22 the company offered to execute a bill of sale, which the purchaser refused, the register having in the meantime been closed at the instigation of the company. The company brought an action for the balance of the purchase-money:—

Held, that it was an implied term of the contract that the ship should be transferred by bill of sale, and that the implied term was not negatived by the express term for a delivery order; that, whether or not the ship being a constructive loss on March 22 for insurance purposes was constructively lost within the meaning of s. 21 of the Merchant Shipping Act, 1894, the power of sale contained in s. 530 carried with it a power to transfer, free from incumbrances; that the company, having been in the wrong up to May 22, did not put themselves in the right by then offering a bill of sale; and that the action failed.

WITNESS ACTION.

The facts, as stated between inverted commas, are taken from the judgment:

"On March 22 last, the *Solway Prince*, a steamer of some 350 tons gross measurement, was sunk in the fairway of the Manchester Ship Canal, after being in collision with another steamer.

"The canal company immediately gave notice to the owners that the sunken steamer was an obstruction and danger to navigation; and that it was their intention forthwith to take possession of, raise, remove, or destroy the vessel, or otherwise to exercise their powers under s. 530 of the Merchant Shipping Act, 1894. (1)

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(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 530: "Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the control of a harbour or conservancy authority, or in or near any approach thereto, in such manner as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation or to lifeboats engaged in lifeboat service in that harbour or water or in any approach thereto, that authority may—

"(*a*) take possession of, and raise, remove, or destroy the whole or any part of the vessel; and

. . . . .

"(*c*) sell, in such manner as they think fit, any vessel or part so raised or removed, ... and out of the proceeds of the sale reimburse them-

"Pursuant to that notice, the company, with the assistance of the Liverpool Salvage Association, and at a total expense which exceeded 3600*l.*, raised the vessel, pumped her out, and, having patched her up, removed her to the pontoon at Manchester.

"On May 1, the company, having duly complied with the conditions precedent as to advertising the fact, offered the vessel for sale by public auction. At the auction, she was knocked down to the defendant for 1675*l.*; and a contract of sale was thereupon entered into."

The contract described the vessel as "a registered ship" of a certain gross and net tonnage, and contained the clause "On completion of the purchase the seller will deliver to the purchaser a delivery order for the vessel," the words "legal bill of sale of" (in print, like the main part of the document) having been crossed through and the words "delivery order for" substituted in writing for them.

"At that time no notice had been given, and no steps taken with a view to the closing of the registry of the ship; by the advertisements, shipbuilders, ship repairers, and others were invited to attend the auction; and the vessel was in fact bid for and sold with a view to her being repaired and employed as a ship; her value for breaking-up purposes was less than half the amount for which she was knocked down to the defendant.

"The date fixed for completion was May 8; and at that time the defendant, who had paid a deposit of 167*l.* 10*s.* on signing the contract, was ready and attended at Liverpool with the balance of the purchase-money, ready to complete. But a difficulty arose in consequence of his insisting that on payment of the balance he was entitled to have the ship transferred to him by such a bill of sale as would enable him to have his name entered on the register as that of the owner of the ship. He says he made it clear to the canal company's brokers that what he wanted was a bill of sale executed by the canal company. The canal company's advisers insisted, on the other hand, that he

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selves for the expenses incurred by them in relation thereto under this section, and the authority shall hold the surplus, if any, of the proceeds in trust for the persons entitled thereto.

. . . . ."

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was bound to complete on receiving a delivery order and nothing more; and that it would then be his business to get himself registered, and for that purpose to procure the registry of the ship to be closed, and the ship to be re-registered. The defendant pointed out that this course would involve remeasurement of the ship, and might result in her net tonnage being increased from the then existing 99 tons to a figure over 100 tons, thereby increasing her working expenses; and he refused to complete. An attempt was made to solve the difficulty by the brokers executing a bill of sale in their name; and this was submitted to the registrar with a view to seeing whether it would be accepted as sufficient for the entry on the register of the defendant's name as owner. It turned out it would not; and on May 22 the canal company for the first time offered the defendant a bill of sale executed by themselves; the register in the meantime having been closed at their instigation by a notice from the owner, under s. 21 of the Merchant Shipping Act, 1894. (1) The defendant refused to accept the bill of sale in these circumstances, or to release the balance of the purchase price which had been deposited in joint names on May 9, under an arrangement whereby the defendant was given possession of the ship for the purpose of executing the necessary repairs, to make her again seaworthy.

"On June 2 this action was commenced, and by the statement of claim the plaintiffs claim in substance payment to them of the balance of the purchase-money, with interest thereon at 5 per cent. from May 8. To this claim the defendant pleads that when he bought the ship she was a registered ship, and so described: and that it was an implied term of the contract that she should be transferred to him by a bill of sale; and that the vendors would deliver to him her certificate of registry, and would do all things necessary to enable him to be entered on the register as owner of the ship, on production to the registrar of a duly executed bill of sale; and further that, until completion, she should continue to exist as a registered ship."

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(1) Merchant Shipping Act, 1894, s. 21, sub-s. 1: "In the event of a registered ship being either actually or constructively lost, taken by the enemy, burnt, or broken up, or ceasing by reason of a transfer to persons not qualified to be owners of British ships, or otherwise, to be a British ship, every owner of the ship or any share in the ship shall, immediately on obtaining knowledge of the event, if no notice thereof has already been given to the registrar, give notice thereof to the registrar at her port of registry, and that registrar shall make an entry thereof in the register book."

Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 52, sub-s. 1: "Sub-section (1.) of section twenty-one of the principal Act"—namely, the Merchant Shipping Act, 1894—"shall be read as if the following words were inserted at the end of that sub-section, 'and the registry of the ship in that book shall be considered as closed except so far as relates to any unsatisfied mortgages or existing certificates of mortgage entered therein.'"

R. B. Lawrence, K.C., and *F. D. MacKinnon*, for the plaintiffs. The plaintiffs properly sold the vessel under the power contained in s. 530 of the Merchant Shipping Act, 1894. The register was rightly closed in accordance with s. 21 as amended by s. 52 of the Merchant Shipping Act, 1906. The ship was "constructively lost" on March 22, 1913, and was abandoned by the owners as a total loss. Whether a ship is an actual or constructive loss is a matter of law which has no meaning except in respect of insurance. Here the ship was treated as constructively lost for insurance purposes. What the plaintiffs sold was a wreck and not a registered ship, and for a wreck a delivery order is the proper means of transfer. Under the contract of sale the purchaser on completion of the purchase was only entitled to have a delivery order. The words "bill of sale" were expressly deleted and "delivery order" substituted. Upon the contract as it stands there is no answer to the plaintiffs' case. The defendant's whole case rests upon alleged implications. What must be treated as implied in a contract is classically stated by Bowen L.J. in *The Moorcock*. (1) The criterion in each case is what must have been the presumed intention of both the parties. Here the implied intention, if any, rests on the statement that the vessel was 99 tons register. In reality that statement was only meant as a description of the ship before she was damaged. With the facts known to the parties—sale under statutory powers of a damaged ship by persons who were not the owners—it is impossible to read into the contract the implications which the defendant alleges to exist. If they existed it would mean that the plaintiffs should persuade the owner to omit to do that which it was his statutory duty to do, i.e., to close the register, and that the mortgagee's name should in some way be got off the register as well. The plaintiffs, while not admitting the right of the purchaser to a bill of sale, have now executed one, and are entitled to the balance of the purchase-money, the purchaser having been in possession of the ship since May 8. Even if they were bound to give a bill of sale, they were excused from doing so, because they were unable in fact or in law on account of the existence on the register of an unsatisfied mortgage to do so. The defendant has suffered no damages.

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(1) (1889) 14 P. D. 64, 68.

Clayton, K.C., and *C. Robertson Dunlop*, for the defendant. Where there is a statutory power of sale, there must be a statutory power of assurance. The statutory power of sale given by s. 530 is not confined to cases of actual or constructive loss, where merely materials are being sold, but may apply to a ship which has been abandoned. The vendee's title is not complete until he is on the register: *The Spirit of the Ocean.* (1) The property passes by bill of sale. Where there is a statutory power of sale, the donee of the power may assure without having the property in him. The contract was for the sale of a registered ship, not of a wreck. The description of 99 tons register has no materiality except in regard to a registered ship. The only way to transfer the ship was by bill of sale. Where there is ambiguity in a contract and words in print have been struck out and others written in, the Court can look at what is written into the printed form and what is struck out: *Rowland and Marwood's Steamship Co.* v. *Wilson, Sons & Co.* (2); *Baumvoll Manufactur von Scheibler* v. *Gilchrest & Co.* (3) But that does not apply here. The words substituted for those deleted are free from ambiguity, and therefore there is no need and, accordingly, no justification for looking at the deleted words. The contract must be read as if it were newly written out with the deleted words omitted: *Inglis* v. *Buttery* (4); *Sailing Ship*

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(1) (1865) 34 L. J. (P. M. & A.) 74, 76.

(2) (1897) 2 Com. Cas. 198.

(3) [1892] 1 Q. B. 253, 256.

(4) (1878) 3 App. Cas. 552, 558, 571.

"*Lyderhorn*" *Co.* v. *Duncan Fox & Co.* (1) The deletion does not amount to a negative statement, that the seller shall not give a bill of sale. It is an implied term of the contract that the vendor shall execute a bill of sale in the statutory form required by s. 24 of the Merchant Shipping Act, 1894. (2) That section is imperative. A delivery order is the proper form of transfer for a wreck, but this was a registered ship, sold as such and capable of being repaired, for which a bill of sale is the proper mode of transfer. The plaintiffs could not complete the sale without a bill of sale. The Legislature has always from earliest time required that mode of transfer for British ships: *The Sisters.* (3) To purport to sell without a bill of sale is a contradiction in terms. The statutory power of sale is in the nature of a common law authority: Sugden on Powers, 8th ed. p. 45; Farwell on Powers, 2nd ed. pp. 1, 2. The registrar, on having a bill of sale in proper form and a declaration of ownership, must register. The donee of a statutory power of sale, absolute in its terms as is the power given by s. 530 (*c*), has, by reason of the power, the right to convey in his own name the legal estate in order to carry out the power: Sugden on Powers, 8th ed. pp. 836, 837, 838; Farwell on Powers, 2nd ed. p. 548. This is so, even though the legal estate is not in him. He does not require the concurrence of the donor of the power. A person not on the register may convey; e.g. in the case of an unregistered mortgagee, who has no power to sell and invokes the intervention and assistance of the Admiralty Courts, the sale is by the marshal of the Court, who conveys by bill of sale. The Act does not say that the bill of sale shall be executed by the registered owner, it says "by the transferor": see s. 24, sub-s. 2. When the Act is dealing with the registered owner, it says so. Whether or not a bill of sale would have been of use to the defendant, and whether or not he could have got himself registered under it, he was entitled to have it. In *Arrow Shipping Co.* v. *Tyne Improvement Commissioners, The Crystal* (1), the Court of Appeal decided, under s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, that a ship which had been in collision and abandoned by the owners had become res nullius, and the owners had ceased by virtue of the abandonment to be owners.

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(1) [1909] 2 K. B. 929, 941.

(2) Merchant Shipping Act, 1894, s. 24, sub-s. 1: "A registered ship or a share therein . . . . shall be transferred by bill of sale."

Sect. 26, sub-s. 1: "Every bill of sale for the transfer of a registered ship or of a share therein, when duly executed, shall be produced to the registrar of her port of registry, with the declaration of transfer, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share, and shall endorse on the bill of sale the fact of that entry having been made, with the day and hour thereof."

Sects. 51, 52, 53, and 54 deal with procedure for registry anew on change of ownership, transfer of registry, and restrictions on re-registration of abandoned ships.

(3) (1804) 5 Rob. A. 155, 159.

If the power to sell were only to sell the possession and not the legal estate, it would be of little use. The power must be to sell in such a way as to enable the highest market value to be obtained for the thing that is being sold. That can only be got if the power is to sell not the mere possession for so long as the owner does not choose to interfere, but for good and all absolutely. The plaintiffs were bound to transfer free from incumbrances, and could only do so by getting rid of the mortgage, which, unfortunately for themselves, they did not do before May 8. A registered owner has an absolute right to convey: *Burgis* v. *Constantine.* (2) The plaintiffs are in the position of owners. A delivery order was not sufficient for the defendant because it would not enable him to get the ship away, as by s. 2, sub-s. 3, unless the certificate of registration is produced the ship may be detained, and the defendant not being the registered owner would not be in possession of the certificate. When a ship is sold as a wreck, no bill of sale is required, because it is a sale of so much material merely, and delivery is sufficient; but where it is the sale of a registered ship a bill of sale is necessary. In the case of a contract between two business parties, the Court must, in accordance with what Bowen L.J. in *The Moorcock* (3) calls "reason," draw the implications which are necessary to give efficacy to the transaction. The plaintiffs were not able and willing on May 8 to give a bill of sale, if they were bound to do so, nor were they able to convey free from incumbrances, though the defendant was ready and willing to do his part.

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(1) [1894] A. C. 508.
(2) [1908] 2 K. B. 484.
(3) 14 P. D. 64, 69.

The owner did not give notice under s. 21 to the registrar because the vessel was not a loss either actual or constructive on March 22 for the purposes of that section. She was a constructive loss for the purposes of the insurance policy, and in the sense that the cost of raising and repairing her would be more than her value. Beyond that she was not a loss. She ceased to be a loss by May 1, because by that time she was in a state in which she could be taken to the pontoon, and the plaintiffs were selling, not a wreck, but a ship which had been taken to the pontoon. Whether or not the vessel was at one time a wreck is immaterial. The question is what she was when she was sold. The contract was made upon the state of facts existing on May 1, not upon those existing on March 22. On May 1 she was in fact a registered ship. The cost of repairing her when raised was less than her value when repaired. She was never a "constructive loss" within s. 21. The question of constructive loss is different in the case of an insurance policy from what it is under s. 21.

When notice to the registrar was given, it was given by a party which had no right to give it, as not being the registered owner. If the defendant had got a bill of sale on May 8, the registrar would have been bound under s. 26, subject to a declaration of transfer being produced under s. 25, to enter his name as owner. Then the defendant would have been free to sell. As it is, he has not had what he could sell. If he had got a bill of sale on May 8, the register would never have been closed. In the circumstances, it was closed by the plaintiffs' solicitors under a mistaken view of law and fact. There never was in fact a proper case for closing the register.

R. B. Lawrence, K.C., in reply. Sects. 21 and 530 must be read together. The power given by s. 530 is only to be exercised where, not necessarily but very probably, s. 21 will come into force. Sect. 35 of the Trustee Act, 1893, dealing with the vesting of stock and choses in action, supplies, by virtue of sub-s. 6, which makes the provisions as to vesting orders apply to shares in ships, the machinery if there is any lacuna in the Merchant

Shipping Acts in giving a power to sell without the right to convey. *Scottish Marine Insurance Co. of Glasgow* v. *Turner* (1), which deals with the passing of the property in an abandoned ship to underwriters, shews an instance in which a vesting order under the Trustee Act might be required. But the point is not what might happen in a hypothetical case, but what is to happen in this particular case.

This was a case of constructive loss. "Constructive total loss" is defined by s. 60, sub-s. 2, of the Marine Insurance Act, 1906. The defendant spent in repairing the vessel more than the difference between 3600*l.*, the cost of raising her, and 4000*l.*, her value when repaired. The effect of s. 60 of the Marine Insurance Act and s. 21 (as amended) of the Merchant Shipping Act is that where the condition of a vessel is such that the owner chooses to give her up the register is to be closed, and no new owner can start without a new survey and re-registration. It is not a question of who gives the notice to the registrar. The event having once happened—as here on March 22—the registrar ought to close the register. The fact that it was not closed till later does not matter. The point is that it ought to have been closed on, or as soon as possible after, March 22. The giving of notice to the registrar is not a condition precedent to the closing of the register. If the registrar knows aliunde that the event has happened he is bound to close the register. This was the case of something between a wreck and a registered ship. That "something" is a constructive loss. In that case the ship ought to go off the register by virtue of s. 21, and the provisions of s. 24 requiring a bill of sale do not apply: Chitty's Statutes, 6th ed. vol. xiii. p. 382, note (*l*). That effect is brought about by operation of law, and the plaintiffs cannot be liable for not preventing the operation of law.

The defendant has admitted that a sale by the plaintiffs gave them a right paramount to a registered mortgage and even to a maritime lien, the highest of all mortgages.

On May 22 the plaintiffs offered and executed a bill of sale. The register was then closed. The defendant says, wrongfully. If so, the matter could have been put right and no harm would have happened. The controversy between the parties has never been whether or not there should be a bill of sale, but whether the register should be closed. There is an independent duty on the registrar to close the register, irrespective of the source from which his information of the event having happened comes. The scheme of the Act is to deal with the registered owner, except in certain cases. However that may be, there was a clear duty on the registered owner to give notice, and the fact that notice was not given for some time does not affect the matter. If the plaintiffs had given a bill of sale on May 8, and the defendant had presented it, it would eventually have resulted in closing the register just as much as what has actually happened.

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(1) (1853) 1 Macq. 334, 342.

Cur. adv. vult.

Dec. 19. Eve J. (after stating the facts as above). On these pleadings the substantial issue I have to try is whether the defendant was bound to complete the purchase in exchange for a delivery order, or whether he was entitled to insist upon a transfer by bill of sale. It has been argued that if he were so entitled, he was in fact offered the bill of sale before action brought; and that by such offer the plaintiffs put themselves in the right, even if they had been previously in the wrong; but I do not think this is so, as in the meantime the ship's registry had been closed; and, according to the evidence, when this condition of things has arisen, remeasurement must precede re-registration; whereas, if the defendant is right, and the plaintiffs had delivered to him the bill of sale before the registry was closed, he could have insisted on being registered as owner without any remeasurement of the ship. In my opinion, the crucial dates to be considered in determining the rights of the parties are those between May 1 and 21; and the offer made by the plaintiffs after the later date cannot put them in the right, if they were wrong antecedent thereto.

I turn now to consider the contract of May 1; and in doing so I read it, as in my opinion I am bound to read it, as though it were all written out afresh, and was not a composite document partly in writing and partly in print, and containing some printed matter which has been struck out but which is still legible. It is, in my opinion, a contract for the sale of a ship actually, and therein correctly described as, a registered ship of a particular gross and net tonnage; and in this, as in every contract of sale and purchase, must be included a term, either express or implied, by which the vendor, on receipt of the purchase-money, undertakes to transfer or cause to be transferred to the purchaser that which is the subject-matter of the sale. In the absence of any express term, in an ordinary contract for the sale of a registered ship, the implied term would be one to the effect that the vendor should execute a bill of sale in the statutory form required by s. 24 of the Merchant Shipping Act. But the plaintiffs allege, first, that there is an express term in this contract which excludes the possibility of any implication, the express term being found in the paragraph which reads: "On completion of the purchase the seller will deliver to the purchaser a delivery order for the vessel." That, they say, negatives the suggestion that the vessel was to be transferred as a registered ship; and binds the purchaser to accept her as a chattel, an aggregation of timber and iron, which he can either restore to a ship or disintegrate and disperse, but which will effectively pass to him by delivery. I do not think this is the true construction of this clause. In this connection it is material to remember that the ship was not, at the date of the contract, in the actual possession of the vendors, but in that of the pontoons company; and I think the true effect of the clause is to impose on the vendors an obligation to put the purchaser into possession on completion, and not to relieve them from the implied obligation to transfer.

But then comes the larger and more difficult question: What was the proper means of transfer? The defendant says: "You sold and I bought a registered ship, a ship capable at that date at a moderate expenditure of being rendered seaworthy and efficient, and in no sense a wreck; the transfer you offer me—a delivery order—is the proper and appropriate one for a wreck, but not for an easily repairable ship; for that a bill of sale is the appropriate, and indeed the only proper, form of transfer, and accordingly I insist upon having it." The plaintiffs on the other hand say: "We are in a difficulty. Sect. 530 gives us a power of sale, but no power to transfer; and further, although it is the fact that the ship was on the register at the date of the contract, and is, therefore, correctly so described in the contract, you, the purchaser, and everybody else must be taken to have known that the registry ought to have been closed; and, had we purported to transfer by bill of sale, we should have been aiding those on whom was cast the statutory duty of taking steps to close the register to disregard that duty. Moreover, the registrar on learning the facts, as he would have done on presentation of the bill of sale, would have insisted on closing the registry. The only way, therefore, of completing the sale was by delivering the ship to the purchaser, and taking steps to close the register; and this we have done."

Which of these contentions is right? That of the plaintiffs is founded mainly on s. 21 of the Merchant Shipping Act, 1894, as amended by sub-s. 1 of s. 52 of the Merchant Shipping Act, 1906. By the section so amended, in the event, amongst other things, of a ship being "constructively lost," every owner of the ship or any share in the ship shall, immediately on obtaining knowledge of the event, if no notice thereof has already been given to the registrar, give notice thereof to the registrar at her port of registry, and that registrar shall make an entry thereof in the register book; and the registry of the ship in that book shall be considered as closed except so far as relates to any unsatisfied mortgages or existing certificates of mortgage entered therein. It has been proved that the value of the *Solway Prince* when repaired is less than the sums expended in raising and repairing her, and for insurance purposes she was undoubtedly "constructively lost" on March 22 (see Marine Insurance Act, 1906, s. 60). But I do not think it follows that the same rules as are applied for insurance purposes are necessarily to be applied in determining whether a ship is "constructively lost" under s. 21. The object, and as far as I can see the sole object, of that section is to keep the register up to date, and purged of all obsolete entries. It can never, in my opinion, have been intended thereby that a ship submerged, or possibly only stranded, for a few days in a comparatively shallow waterway, but unfortunately in such a position

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and manner as to involve a largely disproportionate expense in raising her or getting her afloat, should be treated as constructively lost. The collocation of words "actually or constructively lost, taken by the enemy, burnt, or broken up," points to something in the nature of actual destruction, of irretrievable disaster, irrecoverable loss; and in the absence of authority I am not prepared to hold that s. 21 had any application at all to this vessel. On the contrary, in my opinion, no case for closing the registry in fact arose.

Then comes the question whether the registered owner, and/or his incumbrancers, ought to transfer the ship, or whether the canal company can and ought to do so, by executing a statutory bill of sale on completion of the sale under s. 530. I think the canal company can and ought to do so; and this quite irrespective of the question whether I am right or wrong in the construction I have placed on s. 21. If I am right on the construction, the sale is the sale of a ship registered in the name of an owner, who is only interested in any surplus proceeds of sale after satisfying the expenses to which the selling authority has been put—and it may be with one or more mortgages also entered on the register. In such circumstances, does the Legislature contemplate that the selling authority, exercising the power of sale to satisfy its overriding charge for expenses, must obtain the concurrence of the registered owner and his incumbrancers in the transfer to the purchaser? I think not: such a procedure would be calculated seriously to embarrass the authority in exercising the statutory power of sale, and to detract from the enjoyment of the right to reimbursement. If, on the other hand, my construction of s. 21 is wrong, and a case for the closing of the register arises whenever the ship is constructively lost from an insurance point of view, is it incumbent on the authority, selling under s. 530, not only to procure the register to be closed, so as to get rid of the registered owner, but also to clear it of unsatisfied mortgages not affected by the closing before they can transfer to a purchaser? It cannot be so. The power of sale contained in s. 530 carries with it, in my opinion, a power to transfer and, when the power is exercised in relation to a registered ship, a power to transfer by statutory bill of sale, free and discharged from incumbrances; and, if the practice has been to refuse to enter such transfers on the register in the past, I think it has been adopted under a misapprehension, and ought now to be discontinued.

The result at which I have arrived leads to the conclusion that the plaintiffs were in the wrong, and their action fails. I cannot give them any part of the relief they claim.

But the defendant is in possession of the ship; and he cannot and does not claim to keep her and the purchase-money as well. He only seeks to deduct from the balance of the price the loss which he has sustained; and he raises this case in his defence and by way of counter-claim. I have no doubt that he has sustained some loss, but very much less than the amount he has suggested. Indeed I think it quite possible, if this judgment stands, that the whole matter can be put right by a rectification of the register, involving a very moderate expenditure. In these circumstances I propose on the counter-claim to direct an inquiry what damages the defendant has sustained by the neglect and refusal of the plaintiffs to transfer the ship to him as a registered ship; and to reserve the costs subsequent to judgment. There will be liberty to apply when the certificate has become binding.

The action will be dismissed with costs; and the plaintiffs must pay the costs of the counter-claim down to and including this judgment.

Solicitors: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool; Thomas Cooper & Co.*

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Nov. 18, 19;
Dec. 20.

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[1913 E. 246.]

Restraint of Trade—Contract of Service—Microscopist in Pathological Laboratory—Agreement not to engage in Similar Work within Ten Miles—Restriction lasting for Life—Agreement for Service terminable at a Month's Notice—Construction—Reasonable Restriction.

The plaintiff in this action carried on the business of a pathological laboratory. He had commenced the business in 1901. It consisted of making chemical, microscopical, and bacteriological examinations of samples of material sent to him and making reports thereon. It was in 1901 a new method of medical research; there were only two or three similar institutions in London, and the plaintiff's clients were almost wholly consultant physicians residing in the Harley Street district. In 1905 the plaintiff engaged the defendant as assistant microscopist in his laboratory upon terms which made the engagement terminable on a month's notice, and included an agreement that the defendant would not engage in any similar work within ten miles of the plaintiff's laboratory; no limit of time was expressed. The period of notice was afterwards lengthened. The plaintiff gave the defendant six months' notice on July 15, 1912, but by consent the engagement was determined on October 25. The defendant shortly afterwards opened a pathological laboratory at 25, Beaumont Street, within half a mile of the plaintiff's laboratory. The plaintiff brought this action to restrain him. Sargant J. held on the construction of the agreement that the restriction was confined to the time during which the engagement continued, and dismissed the action:—

Held by the Court of Appeal (Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ.), on the construction, that the restriction lasted during the whole of the defendant's life.

Held by Cozens-Hardy M.R. and Phillimore L.J., Swinfen Eady L.J. dissenting, that the restriction was wider than was reasonably necessary for the plaintiff's protection and was therefore void.

Decision of Sargant J. affirmed, but on different grounds.

THE plaintiff in this action had in 1901 commenced carrying on the profession of a pathologist at 62, Queen Anne Street, W., under the style of "The Laboratories of Pathology and Public Health." His business consisted in making pathological examinations of samples of material sent him by his clients, by chemical, microscopical, and bacteriological methods, and giving reports and opinions thereon. The material was sometimes sent him by hand, more usually by post.

When the plaintiff started this work in 1901 it was an entirely new branch of scientific medicine. There were not more than two or three similar institutions in London. One called "The Clinical Research Association, Limited," was in Southwark Street, S.E., in the neighbourhood of Guy's Hospital, and one in New Cavendish Street, W. At first the plaintiff's clients were almost exclusively consultant physicians residing in the Harley Street neighbourhood. Afterwards other doctors in London and the country and medical officers of health began to send him material for examination, and at the date of the hearing of this action only one-tenth of his clients were consultants. In the year 1905, by which time the plaintiff was employing several assistants, he advertised for an assistant microscopist. The defendant was then a young man who had commenced general practice, but, finding that by temperament he was unsuited to such practice, had determined to give it up. He answered the advertisement and asked for further particulars. The plaintiff sent written particulars which stated in detail the duties to be performed, the hours of attendance (which were from 9 A.M. to 6 P.M.) and the holidays to be allowed, fixed the salary at 150*l.*, rising by 50*l.* a year to 300*l.*, and contained the following clauses:—

"9. One month's notice of termination of appointment to be given by either party in writing."

"12. The candidate selected will be required to enter into a bond not to engage in similar work within a distance of ten miles from these laboratories, either for himself, or on behalf of any other institution of a like character, under a penalty of 250*l.*

"13. The acceptance of the post by the selected candidate will be taken as an agreement with each and all of the foregoing conditions, and constitute a binding agreement on this basis between him and G. L. Eastes."

The defendant accepted the post upon these conditions, commenced work on January 1, 1906, and continued to work with the plaintiff upon the same terms until 1912, except that by agreement the notice required to determine the appointment was extended to six months; and the defendant's salary was raised from time to time beyond the maximum fixed by the particulars. In his last year he received more than 600*l*.

On July 15, 1912, the plaintiff gave the defendant six months' notice to determine his appointment, but by mutual consent it was determined on October 25, 1912.

Soon afterwards the defendant opened a medical laboratory at 25, Beaumont Street, W., within about half a mile of 62, Queen Anne Street.

The plaintiff brought this action to restrain the defendant from carrying on the work of a laboratory of pathology or public health similar to the plaintiff's within the distance specified in the agreement.

The defences raised were (1.) that on the construction of the agreement it only related to the time during which the defendant's employment continued; (2.) that the defendant had entered into the agreement by mistake; (3.) that the restriction was unreasonable and void at law.

The evidence shewed that several institutions of this kind existed in large towns outside London, and that these institutions were now largely used by doctors other than consultants, and by public officers of health.

It was also proved that the defendant had shewn himself remarkably competent in this particular branch of pathology, and had outside his hours of employment pursued researches in it, of such importance that his results had been published by the Royal Society.

It did not appear that the defendant had ever signed the particulars or any document referring to them, but he admitted that he had entered into the plaintiff's employment upon the terms of the particulars, and no objection was taken under the Statute of Frauds. No bond had in fact been executed.

The action was heard by Sargant J. on May 26 and 27, 1913, when he decided on the question of construction that the restriction was in force only during the continuance of the defendant's employment and dismissed the action. The plaintiff appealed.

Martelli, K.C., and *R. L. Ramsbotham*, for the appellant. It is contended that the contract is unreasonable because there is no limit of time to the restriction. But in *Marshalls* v. *Leek* (1) a man was restrained from carrying on a business without any limit of time.

[COZENS-HARDY M.R. That was a case of sale of the goodwill of a business.]

In *Mumford* v. *Gething* (2) a traveller contracted not to travel over the same ground for any one else, and the contract was enforced though there was no limit of time. The construction put upon the contract by Sargant J., that the restriction is limited to the time of employment, makes it meaningless and valueless. There is no limit of time expressed in the contract and none can be implied. A contract not to do is a contract never to do, unless some limit of time is expressed. The fact that a bond is required suggests the inference that the restriction was to apply after the end of the employment.

The defendant has pleaded that he made a mistake and did not intend to enter into such a contract, but it has long been settled law that the mistake of one party, when there is no ambiguity in the contract, and no misrepresentation by the other party, is no ground for not enforcing a contract.

There are similar establishments now in many, if not most, large towns, and the defendant is so skilful a pathologist that he would get plenty of clients wherever he was.

Romer, K.C., and *Tomlin, K.C.*, for the respondent. Apart from the special words of the contract it is wholly unreasonable that a young man, entering into a contract for service under which he was liable to dismissal at one month's notice, should bind himself for his whole life not to engage in similar work within the area in which alone it can be carried on with prospects of great success: see the judgment of Fletcher Moulton L.J. in *Sir W. C. Leng & Co.* v. *Andrews.* (3)

On the question of construction every other clause in this contract relates to what is to be done during the service. And in every contract of service every clause would be naturally construed as confined to the duration of the service unless it is otherwise expressed; you cannot say that every clause in which

(1) (1900) 17 Times L. R. 26.
(2) (1859) 7 C. B. (N.S.) 305.
(3) [1909] 1 Ch. 763, 771.

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a limit is not fixed is to last for ever: *King* v. *Hansell.* (1) There is no absurdity in so construing this clause. The plaintiff might well consider that the defendant could not do his work well if he engaged himself in similar work at the same time.

On the question of mistake it is plain that the parties were never at one. And if one party has put forward the terms of a contract in a form which the other party misunderstands, the party putting forward the terms cannot have specific performance of the contract which the other party has never understood: *Higginson* v. *Clowes.* (2)

[COZENS-HARDY M.R. referred to *Powell* v. *Smith.* (3)]

In that case the misunderstanding was on the side of the party who put forward the terms and it is distinguishable on that ground. The proposition we contend for is established by *Manser* v. *Back* (4); *Wycombe Ry. Co.* v. *Donnington Hospital* (5); *Tamplin* v. *James* (6); *Wilding* v. *Sanderson* (7); *Falck* v. *Williams.* (8)

On the question of reasonableness, every case must be looked at with regard to the nature of the business and the kind of customers, and also with regard to the interest of the public. The question of what is reasonable is quite different in the case of a sale of goodwill and in the case of a contract of service. In service agreements the employer has no right to be protected against mere competition. The burden is on the employer to prove that the conditions he imposes are reasonable: *Sir W. C. Leng & Co.* v. *Andrews.* (9) The only things which he has a right to be protected from are the disclosure of secrets and the use of particular knowledge gained during the employment. The restriction in this case is unreasonable because it extends to forbid the defendant doing similar work, within the boundary, in hospitals where there would be no competition, and there are no trade secrets or particular facts or methods from the disclosure of which the appellant has a right to be protected. There may be institutions similar to the plaintiff's in some other places, but the Harley Street district is the centre of this sort of work and it is unreasonable to exclude the respondent from it. It is against the interest of the public that a man of the respondent's eminence should be prevented from doing valuable work in the place best suited for it.

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(1) (1860) 5 H. & N. 106, 110.
(2) (1808) 15 Ves. 516.
(3) (1872) L. R. 14 Eq. 85.
(4) (1848) 6 Hare, 443.
(5) (1866) L. R. 1 Ch. 268.
(6) (1880) 15 Ch. D. 215.
(7) [1897] 2 Ch. 534.
(8) [1900] A. C. 176.
(9) [1909] 1 Ch. 763.

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R. L. Ramsbotham, in reply, was not called upon on the question of mistake. The point of the restriction being for life and the employment determinable at the end of a month is entirely met by the decision of *Haynes* v. *Doman.* (1)

Cur. adv. vult.

Dec. 20. COZENS-HARDY M.R. In this action the plaintiff, who is carrying on a laboratory of pathology and public health in Queen Anne Street, seeks to restrain the defendant, who was engaged as an assistant microscopist, and whose employment has been terminated, from carrying on a business contrary to a clause of the agreement. The plaintiff asserts that the agreement bound the defendant during his whole life, whereas the defendant says it was limited to the continuance of the engagement of service. The defendant also says that he understood it in that sense, and that it ought not to be enforced against him in any other sense. The further point is raised by the defendant that the restraint is unreasonable and bad in point of law.

Before considering the agreement in detail it is right to observe that the covenant is not in connection with the sale of the goodwill of a business, nor is it to prevent the disclosure of trade secrets, for it is not suggested that there are any secrets connected with this business. The case is one simply of contract of service.

The defendant, who at the date of the contract was a general practitioner, in answer to an advertisement saw the plaintiff, who put before him an agreement containing thirteen clauses. It has been agreed that, although the document was not signed by the defendant, no objection is to be taken on that ground. The terms of the engagement are to be found in the unsigned document. Clauses 1 to 11 define the duties of the assistant microscopist, his salary, and other incidents, one of which was that

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(1) [1899] 2 Ch. 13.

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either party could terminate the engagement by one month's notice in writing. Clause 12 is as follows: "The candidate selected will be required to enter into a bond not to engage in similar work within a distance of ten miles from these laboratories, either for himself, or on behalf of any other institution of a like character, under a penalty of 250*l.*" As a matter of construction I think this clause is not limited to the duration of the engagement. I see no ground for inserting in the clause the words "so long as he shall continue assistant" or any equivalent words. I think the obligation is imposed upon the defendant during the whole of his life, and that it cannot even be limited to the joint lives of the plaintiff and defendant. Sargant J. took a different view and dismissed the action on this ground. With great respect I cannot agree with this.

The defendant raised a further point, to which I am unable to attach any weight. He says in effect: The agreement was prepared by the plaintiff; clause 12 is obscure; I did not understand it, I mistook its meaning, and no injunction ought to be granted. In my opinion, in the absence of any conduct depriving the plaintiff of his right to relief, of which there is no trace in the present case, he is entitled to hold the defendant bound by clause 12, according to the construction which it bears. It is not a case falling within the special jurisdiction exercised by the Court in matters of mistake.

The point of real difficulty in the present case is whether the restraint is or is not unreasonable. The recent case in the House of Lords of *Mason* v. *Provident Clothing and Supply Co.* (1) is an important authority. The Lord Chancellor (2) calls attention to the difference between a mere contract of service and an agreement made to protect the sale of a goodwill or to guard against the disclosure of special trade secrets. A restraint in a mere contract of service is invalid if it goes beyond what is necessary for the protection of the rights of the employer. Whether there are such rights must depend upon the character of the business. Again (3) he says: "Such a restraint on the liberty of a man to earn his living or exercise his calling is a

(1) [1913] A. C. 724.

(2) [1913] A. C. 731.

(3) [1913] A. C. 732.

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serious one, and the Courts have always regarded such restrictions with jealousy. They have steadily refused to allow the question of their validity to be decided by a jury. Questions of this kind have always been reserved by the Courts as being for the Court itself, and to be decided in accordance with a definite legal test." Then he says (1), after referring to the language of Lord Macnaghten in the well-known case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2), that it is for the employer to satisfy the Court that the restriction goes no further than is reasonable for the protection of his business, and not for the servant to shew that it is unreasonable. I am not sure that this view as to the onus of proof is consistent with earlier authorities, but I do not think in the present case it is material to consider whether it is for the plaintiff to satisfy the Court that the restraint is reasonable or for the defendant to satisfy the Court that the restraint is unreasonable. The point is raised and must be decided. Lord Shaw (3) lays emphasis upon the circumstance that the restriction, which he held bad, was to last for three years. He cited with approval the passage from the judgment of Farwell L.J. in *Sir W. C. Leng & Co.* v. *Andrews* (4), where the Lord Justice said that Lord Macnaghten's doctrine does not mean that an employer can prevent his employee from using the skill and knowledge which he has learnt in the course of his employment. "'That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction.'"

The only other authority to which I desire to refer is *Proctor* v. *Sargent* (5), where Tindal C.J. pointed out that when we are deciding upon the reasonableness of a contract of this kind we cannot leave out of consideration the duration of the restraint. It remains to apply the above principles to the present case.

What was the nature of the business? The plaintiff in 1901 commenced to practise as a pathologist in Queen Anne Street. At that time the business was almost a novelty. There were only two similar businesses in London, one in New Cavendish Street, in the Harley Street region, and the other in Southwark Street, not far from Guy's Hospital. The clients were at first largely consultants. At the present time other medical men are the majority. The material to be examined was sent sometimes by hand and sometimes by post; the actual patients were very seldom seen. In 1905 the plaintiff wanted extra help, and he inserted an advertisement, which was answered by the defendant and eight or nine others. The defendant was a young general practitioner with scientific tastes. A reference to the Medical Directory shews that he took his London M.B. in 1903, so that at the date of the agreement he was probably about twenty-six or twenty-seven years old. He certainly was not then what he is now, a scientific pathologist of distinction. Such being the position of the parties, the defendant in consideration of a contract of service which might be terminated by one month's notice bound himself that he would not during his whole life engage in work similar to that which he was employed to do for the plaintiff within an area of ten miles from Queen Anne Street. This area includes the whole of, and a great deal more than, the Harley Street area, which is to the consultant branch of the medical profession very much what Lincoln's Inn and the Temple are to members of the Bar. The plaintiff was, of course, exposed to the competition of any number of skilled scientific experts who might set up in this immediate neighbourhood. To exclude all competition is neither necessary nor reasonable. The interests of the public have to be considered. The plaintiff has not satisfied me that it was in any way necessary or reasonable for the protection of his business that the defendant, in particular, an untried and untrained young doctor, should be excluded from the ranks of competitors not only during the plaintiff's own life but also during the defendant's life. There may undoubtedly be cases in which a lifelong restraint may be capable of justification, but in my opinion this is not one of such cases. I am not prepared to subject the defendant to what I can only regard as a wholly unreasonable lifelong interference with his liberty to carry on his professional business in the quarter in which it can be most profitably carried on. If the restraint had been for a short period or had been confined to the plaintiff's clients the restraint might perhaps have been supported. But it must stand or fall as an entirety. It is not severable, so as to be good in part though bad in other parts. With great respect to Sargant J., I think the restraint was unreasonable. This being so, in my opinion the judgment of the learned judge is correct, although not for the reasons stated by the learned judge. In my opinion the appeal should be dismissed.

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(1) [1913] A. C. 733.
(2) [1894] A. C. 535, 568.
(3) [1913] A. C. 737, 740.
(4) [1909] 1 Ch. 773.
(5) (1840) 2 Man. & G. 20, 33.

Swinfen Eady L.J. This is the plaintiff's appeal from the judgment of Sargant J. dismissing the action. The plaintiff and defendant are medical men. The defendant was formerly in the employ of the plaintiff as assistant microscopist engaged in making microscopical examinations mainly of a bacteriological character. The plaintiff seeks to obtain an injunction to restrain the defendant from engaging in similar work within a distance of ten miles from 62, Queen Anne Street, London, contrary to the terms of his engagement with the plaintiff.

Three points have been raised: First, that according to the true construction of the terms of the defendant's engagement he is only precluded from engaging in similar work during his employment with the plaintiff and not afterwards. Sargant J. adopted this view. Secondly, that if the defendant's construction of the terms of engagement is not the correct one, he was mistaken as to the meaning of the terms which were written by the plaintiff, and he ought to be relieved from the consequences of his mistake. Thirdly, that the restriction is wider than reasonably necessary for the plaintiff's protection, and therefore void. It was further suggested that it was opposed to the public interest that the defendant should be restrained by injunction.

The plaintiff, in the year 1901, commenced to practise as a pathologist at 62, Queen Anne Street. His profession is to make pathological examinations for medical men. Sometimes the material to be examined comes by messenger, and occasionally patients are brought or sent to him, but usually the material for examination is sent to him by post. When the plaintiff started his business in 1901, there were not more than two or three similar institutions in London; one was called the Clinical Research Association, Limited, in Southwark Street, S.E., and another was Mr. Martindale's laboratory in New Cavendish Street. It was a new field of pathological work, the value of which has come to be more and more recognized with lapse of time. At first it was mostly consulting practitioners who availed themselves of this expert scientific advice. In 1905 the plaintiff's business was mostly with consultants. It has grown very much, and numerous medical men, including officers of health, now avail themselves of the plaintiff's labours. At present about one-tenth only of his work is obtained from consultants, and nine-tenths from other medical men in London and the country. At the end of 1905 the plaintiff's work had increased so much that he required professional assistance, and advertised for it, receiving eight or ten answers, one of which was from the defendant. The plaintiff prepared a memorandum or note of the terms on which he was willing to engage an assistant, and the defendant entered the plaintiff's employ on these terms which are set out in paragraph 1 of the statement of claim. This memorandum was not actually signed by the defendant, but he declined to take or rely on any objection on that ground, even if it were open to him. There is not any dispute that the defendant entered the plaintiff's employ on these terms and remained with him until October 25, 1912, the only variation being that the defendant's salary was increased, and a longer notice of termination of appointment was agreed upon. Since leaving the plaintiff's employ the defendant has commenced practice in similar work, namely, as a consulting pathologist, at No. 25, Beaumont Street, which is close to Harley Street, the two streets being connected by Devonshire Street. He has circularized the plaintiff's clients, among others, and some of them have gone to him. He admitted that during the time he was with the plaintiff he had many introductions to medical men; that where he has started practice he has opportunities of obtaining the plaintiff's clients, and that his opposition may be serious for the plaintiff in the course of time. Clause 12 of the terms is as follows: "The candidate selected will be required to enter into a bond not to engage in similar work within a distance of ten miles from these laboratories, either for himself, or on behalf of any other institution of a like character." Sargant J. construed that clause 12 as extending only to the period of his employment by the plaintiff. It follows clauses 1 to 11, which relate to the period of employment, and is in the position in which it would naturally come if it was making provision for what was to happen subsequently. It is not in terms limited to the period of employment. It is clear from the evidence of the plaintiff that the time which the defendant was to give was full time service under the agreement; that the plaintiff could not with advantage have had further hours of work from the defendant. The working hours were long, from 9 A.M. to 6 P.M., and included certain Sundays and Bank holidays. The defendant would have no spare time for other paid employment, although no doubt he was much interested in his professional work, and did not spare himself at home, but was engaged in research work there. When pressed to explain what could be the reason for preventing similar work within ten miles, but allowing it elsewhere, during the continuance of the agreement, counsel could only suggest that the work was of so tiring and exhausting a nature, especially trying to the eyes, that a limit of ten miles would be sufficient to preclude work altogether by exhausting such energy as might remain to the defendant after his day's work. I am quite satisfied that this suggestion is without foundation. In my judgment, the plain and obvious meaning of the clause is that the defendant shall not at any time thereafter engage in similar work within ten miles, so as to prevent competition with the plaintiff in that very limited area. The plaintiff was establishing not only a new business, but a new kind of business; the defendant would acquire experience while in the plaintiff's employ; and the purpose of this clause was to prevent the defendant competing with the plaintiff after the period of service had expired, and it would also render the plaintiff's business more valuable to sell if the restriction prevented his old employee setting up a competing business.

The second point urged was that of mistake. But this cannot be maintained. There is no counter-claim, and the defendant has received the full benefit of the agreement, having ultimately

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been paid as much as twice the maximum salary originally agreed upon. The clause is not, in my opinion, ambiguous, and the defendant cannot be allowed to escape from his agreement by alleging that he understood it in some other sense than its real and true meaning.

In Fry on Specific Performance, 5th ed. s. 765, the law is thus stated: "It seems on general principles clear that one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract, or any of the terms in which it is expressed. To permit such a defence would be to open the door to perjury and to destroy the security of contracts."

In *Tamplin* v. *James* (1) specific performance was decreed against a purchaser who alleged that he entered into the contract of purchase under a mistake and in the belief that he was also buying certain additional garden ground. Baggallay L.J., who was sitting for Malins V.-C., stated the law thus (2): "Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous." This decision was upheld by James L.J., Brett L.J., and Cotton L.J. on appeal, James L.J. saying (3): "It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side."

The case of *Wilding* v. *Sanderson* (4), so much relied upon by the defendant, is readily distinguishable. In that case the consent order as passed and entered did not express the real agreement previously arrived at between the parties, and which the order was intended to carry out, and was set aside on that ground. But in the same case Lindley L.J. said (5): "A written contract cannot be impeached simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed. This is a sound principle." Those two points, therefore, wholly fail.

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(1) 15 Ch. D. 215.

(2) 15 Ch. D. 217.

(3) 15 Ch. D. 221.

(4) [1897] 2 Ch. 534.

(5) [1897] 2 Ch. 550.

The remaining point is whether the agreement is void as containing too wide a restriction or is otherwise void on any ground of public policy. On this point Sargant J. was in favour of the plaintiff. The question to which an answer must be given was thus formulated by Lord Moulton in *Mason* v. *Provident Clothing and Supply Co.* (1): "Are the restrictions which the covenant imposes upon the freedom of action of the servant after he has left the service of the master greater than are reasonably necessary for the protection of the master in his business?" With regard to space the area is a very restricted one, ten miles from 62, Queen Anne Street, London. The whole of England outside this radius is open to the defendant. At the date when the agreement was made, the plaintiff had many clients residing or practising within this area, and to the verge of it, and even beyond: at Ealing and Southall on the west, Wimbledon and Kingston on the south-west, and Leytonstone, Forest Gate, Ilford, and Wanstead on the east; and at many other places marked by a red cross on the map exhibited; indeed the defendant did not suggest that the area of exclusion ought to have been smaller to protect the plaintiff or that a smaller area would have sufficiently protected the plaintiff. From the defendant's point of view an area of two miles from Queen Anne Street would have been as bad as ten miles. His complaint was that he is excluded from the area referred to as the Harley Street area, which is the area in which the plaintiff's laboratories are situate, and the defendant alleged that unless he was allowed to engage in his work in that very restricted area, within which most of the consultants were found, he might as well not start at all. It must, however, be borne in mind, that although when the plaintiff started this pathological business in 1901 it was a new sphere of operations, yet the importance and value of this work is now very fully recognized, and there is a demand in various centres in England for this skilled work. Much work of this character is influenced by medical officers of health, who are spread all over England. There are also many private pathological laboratories outside London, that is to say, at Bournemouth, Torquay, Hove and Brighton. There is also a demand for pathologists for the various hospitals throughout the country, some of these allowing the employee also to engage in private practice. At the trial advertisements in the current numbers of medical journals for such pathologists were adduced in evidence, some allowing private consultation work. Indeed the fact that work of this kind was increasing very largely was urged in the Court below as a reason for not interfering with the defendant at his new place of business. The truth is that there is a very extensive field for the work, at which the defendant is admittedly skilful, outside the area of Harley Street, but it is in this area, where he will be directly competing with the plaintiff and where he himself said that he had opportunities of obtaining the plaintiff's clients, that he wishes to be at liberty to continue his work.

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(1) [1913] A. C. 742.

Again it was faintly suggested that the public interests required the defendant's services in the area of Harley Street, but the plaintiff's evidence made it clear that he and his staff could deal with a more extensive demand than exists for work of this character. There was not a scintilla of evidence of any deficiency in the supply of skilled workers in the neighbourhood of Cavendish Square, and the public interests are best served by keeping persons to the contracts into which they have entered.

As regards space I am of opinion that the restriction is not greater than is reasonably necessary for the protection of the plaintiff.

Then there remains the question of the duration of the restraint. By the contract the defendant agreed not to do certain things, without any limit of time. In other words, he has agreed never to do them, so the contract lasts for the term of his natural life.

It is well settled that in service agreements a covenant is not necessarily void by reason of its extending to the whole life of the covenantor. The leading case on this point is *Hitchcock* v. *Coker*. (1) The plaintiff was a druggist at Taunton, and had taken the defendant into his employ as his assistant. The

(1) (1837) 6 Ad. & E. 438.

defendant agreed not at any time thereafter to carry on business as a chemist and druggist at Taunton or within three miles under a penalty of 500*l*. In the Exchequer Chamber, on error from the King's Bench, the agreement was held valid. The judgment of the Court was delivered by Tindal C.J. He said (1): "The good-will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good-will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be, by making the restriction of the servant's setting up or entering into the trade or business within the given limit co-extensive with the servant's life. And, accordingly, in many of the cases which have been cited, the restriction has been held good, although it continued for the life of the party restrained. And, on the other hand, no case has been referred to, where the contrary doctrine has been laid down." Then he refers to several cases on the same lines, one the case of an attorney in London, and there are other cases therein referred to, one of those being the well-known case of *Chesman* v. *Nainby* (2) in the House of Lords. It was a case in which the question was as to a life

(1) 6 Ad. & E. 454.

(2) (1727) 2 Ld. Raym. 1456; 2 Str. 739.

agreement. That action was brought by the mistress and it was tried before King C.J., and the plaintiff succeeded. There was a motion in arrest of judgment in the Common Pleas, and again the plaintiff succeeded. Then there was an error brought to the King's Bench, and the plaintiff succeeded again, and then a writ of error was brought, and all the judges were summoned and gave their views. After hearing counsel, and the unanimous opinion of all the judges having been delivered, it was ordered that the judgment below be affirmed.

The case of *Hitchcock* v. *Coker* (**1**) is in my judgment a case of the highest authority. It has been treated as settling the law on this point. In *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2), Lord Macnaghten said of Tindal C.J., who delivered the judgment of the Exchequer Chamber in *Hitchcock* v. *Coker* (1), "There is no higher authority upon this subject in modern times than Tindal C.J. He had more to do with moulding the law on this head and bringing it into harmony with common sense than all the judges since Lord Macclesfield's time put together. You will hardly find any judgment in reference to restraint of trade delivered by any Court in England or America during the last sixty years in which some passage is not cited from some judgment of Tindal C.J." In the same case Lord Macnaghten said (3), commenting on Bowen L.J.'s observations on the decision of Lord Langdale, in referring to the matter having to be decided by the Common Law Courts, "In such cases it was undoubtedly the duty of equity to follow the common law. The province of the Court was to give effect to common law rights. If the covenant was void at common law, a Court of Equity would have erred grievously in attempting to enforce it by injunction. If the question had been doubtful, it would have been the duty of the Court, at least in the time of Lord Langdale, to leave the parties to their common law rights, or to take the opinion of a Court of common law."

In *Mallan* v. *May* (4) the defendant was assistant to the plaintiffs in their business of surgeon dentists, and agreed not to carry on that business in London at any time thereafter. This covenant was held valid by the Court of Exchequer, the judgment being delivered by Parke B.

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(1) 6 Ad. & E. 438.
(2) [1894] A. C. 535, 569.
(3) [1894] A. C. 563.
(4) (1843) 11 M. & W. 653.

In *Mumford* v. *Gething* (1) a restraint upon a commercial traveller for lace merchants, precluding him from ever travelling for any other firm than the plaintiffs within the district in which they employed him, was held valid by the Court of Common Pleas. There are other cases to the same effect. It will be observed in the cases to which I have been referring, these are agreements for the period of life, and some of them refer to London, and not only to some country town.

Then, in order to determine whether valid or invalid, what is the test to be applied? In my opinion, it is the test that was formulated by the Court of Common Pleas in 1831, when Sir Nicholas Tindal was Chief Justice, in *Horner* v. *Graves* (2), and adopted by Lord Herschell as the test in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3): "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable."

Is it possible to contend that, in the present case, the restraint is larger than required for the reasonable protection of the covenantee? It is established that the defendant is a gentleman of exceptional skill and scientific attainments; his name has become well known to the plaintiff's clients, and to some of them he is known individually; while the defendant was in the plaintiff's employ the plaintiff's work about doubled; the plaintiff said of the defendant that he was an exceptional man, and that people would (generally speaking) seek him out wherever he was; and that the further off the defendant was the better for the plaintiff; the defendant himself spoke of the keen interest he takes in his scientific work, of working three to five hours a day in his own

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(1) 7 C. B. (N.S.) 305.

(2) (1831) 7 Bing. 735, 743.

(3) [1894] A. C. 549.

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private time after his daily duties to the plaintiff had been discharged, of reading before the Royal Society the results of his work. This learned society published these results and made to the defendant a money and instrument grant. Who can doubt that a gentleman of such attainments and energy, if only he can keep his health, will be able, in a perfectly legitimate manner, to keep his name well before the medical profession and command work wherever he is; that he will be restricted from competing on equal terms with his late employer so long only as he is excluded from the defined area, but that if admitted to practise within it at any time during his life he will be able to damage the plaintiff and injure his practice, by being able to compete with him effectually? He practically says so himself. Locality commands practice of this kind, and the defendant does not conceal the fact that his being admitted into and allowed to practise in the disputed area will enable him to attract the plaintiff's clients. And the inference from the facts proved is that this will always be the case if at any future time the defendant should gain admittance to the area. The reasonable protection of the plaintiff requires that the restriction should be for the life of the defendant.

In considering a case like the present, the circumstances must be taken into account. How is it possible to compare the position of the defendant, having regard to his eminent scientific abilities and qualifications, with a traveller for a clothing company, one out of seven thousand similar employees, as in *Mason* v. *Provident Clothing and Supply Co.* (1), or to the case of a milkman employed in a local round, or to a junior newspaper reporter in a provincial town, as in *Sir W. C. Leng & Co.* v. *Andrews* (2), or the like?

The question is, is the restraint reasonably necessary for the protection of the employer? This is the test, and tried by this test, the answer must, in my opinion, be in the affirmative.

It has been urged, Ought not the hardship on the defendant to be taken into account? The restraint will or may prevent a man still young from engaging in attractive scientific work in the locality where it can best be carried on, and thus be hindered from attaining the highest honours which his profession makes open to him. But is not the hardship upon the plaintiff, of refusing to enforce the restriction, also to be considered? The plaintiff was endeavouring to build up a business in a new branch of work, the like of which had scarcely existed in London before. He had to find the capital and business premises, pay the staff, and run the financial risk involved in building up a business of this character. The defendant was then an unknown man acting as locum tenens for a friend. He had been for a short time in general practice at West Ealing, but had realized that by temperament he was unfit for general practice, and had determined to give it up. Then the position of assistant to the plaintiff was open to him. It meant a certain and increasing income, regular hours of work, and sufficient leisure to pursue independent scientific investigation. By the terms of the agreement, the salary, which began at 150*l.* per annum, was to rise by annual increments of 50*l.* to 300*l.* But before the defendant left he was being paid about double the maximum amount. The defendant has received great benefit from the agreement. Would it not now be a great hardship upon the plaintiff if the defendant were to be permitted to take away the benefit of the connection which he has been paid to assist in building up?

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(1) [1913] A. C. 724.

(2) [1909] 1 Ch. 763.

In the circumstances of the present case, the question upon whom lies the onus of proof becomes almost, if not quite, immaterial, whether it is for the plaintiff to prove that the restraint is reasonable or for the defendant to shew that it is unreasonable. There is no contest about the facts. No one suggests that the defendant will not take away clients from the plaintiff whenever he enters into the limited area. The defendant himself concedes that he will do so. There is not a suggestion from beginning to end of the evidence that a restraint for less than the whole of the defendant's life would give the same, or substantially the same, protection as if it were for the whole life. It is merely the contention of counsel that in any case a restraint for the whole life must be unreasonable. I have already dealt with this. There is much authority for holding that in a case of partial restraint like the present the burden of proving that the restraint is unreasonable is on the defendant alleging it. In *Mills* v. *Dunham* (1) Lindley L.J. said: "The contention that you are to treat a restraint of trade as prima facie bad, and throw upon the person supporting it the onus of shewing that it is reasonable, is introducing a wholly unsound principle into the construction of documents."

In *Haynes* v. *Doman* (2) Romer L.J. said: "Where a man of sufficient age and business capacity knowingly enters into a contract of service which is only in partial restraint of trade, I think the onus lies on him to prove that it goes beyond what was reasonably necessary." He then said: "And see *Rousillon* v. *Rousillon* (3), where Fry J. shews that the case of *Mallan* v. *May* (4) supports the above view, and adds that it was also his opinion that the burden of shewing that such a restraint was plainly and obviously beyond what the master's interests required rests on the defendant, the servant. And he further said, in effect, that that ought to be the rule of law, because the defendant is seeking to put a restraint upon the freedom of contract, and he who does that must shew that the purposes of freedom of trade require the freedom of contract to be so curtailed." Lord Macnaghten adopts this view in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* in the passage to which I have already referred.

In the recent case of *Mason* v. *Provident Clothing and Supply Co.* (5), when the Lord Chancellor said that the respondents had to shew that the restriction they had sought to impose went no further than was reasonable for the protection of their business, he was not, as I think, dealing with the question of burden of proof; he did not refer to the weighty authorities which I have cited, or say that they ought to be overruled; he was rather expounding what was a valid restriction than dealing with the burden of proof. However that may be, a restriction upon the defendant for any less period than his life would be ineffective, and insufficient to protect the plaintiff, and a restriction for the whole of his life is not longer than reasonably necessary for the protection of the plaintiff and his business.

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(1) [1891] 1 Ch. 576, 586.

(2) [1899] 2 Ch. 13, 30.

(3) (1880) 14 Ch. D. 351.

(4) 11 M. & W. 653.

(5) [1913] A. C. 724, 733.

In my judgment the plaintiff is entitled to an injunction.

Phillimore L.J. The plaintiff seeks to restrain the defendant from setting up as a pathologist and microscopist near him in London in breach, as he says, of a clause in his agreement of service.

The defendant entered his service as an assistant microscopist in 1906 on the terms of an agreement of which the last clause is as follows: "The candidate selected will be required to enter into a bond not to engage in similar work within a distance of ten miles from these laboratories, either for himself, or on behalf of any other institution of a like character, under a penalty of 250*l*." He left the plaintiff in pursuance of a mutual arrangement on October 25, 1912, and has since set up in the same branch of medical science at 25, Beaumont Street, in the county of London. The defendant sets up three defences. First, that upon the true construction of the agreement the restraining clause only applied during his period of service. As to this defence I am of opinion that he fails. The crowning argument which had weight with me was the observation of Mr. Ramsbotham that the restriction of ten miles was quite inappropriate if the clause applied and only applied to the time when he was in service.

The second defence I have been wholly unable to grasp, and I am not sure that I shall state it correctly now, for the argument seemed to me so elusive, but as I apprehend it it was to the effect that there is a rule of law that when the construction of an agreement is not absolutely clear and the form of the agreement is such that it is proposed or drafted by one side and accepted by the other the acceptor is to be allowed to say that he mistook the true meaning of the words. If that is the argument I think it is unsound and bad law.

The third defence is that the clause is unenforceable as involving restraint upon the defendant's liberty larger than is necessary for the due protection of the plaintiff's interests. I think this defence raises a difficult point. It is to be observed

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that this is not the case of a sale of goodwill with an ancillary clause for the protection of the goodwill; neither is it a case where there are trade secrets, nor is it a case of a contract of apprenticeship. The legitimate object of the clause is to prevent the defendant from using in competition with the plaintiff the connection which he has acquired during his period of service and any personal knowledge of clients which would assist him in obtaining or handling a practice.

But how far is the employer entitled to carry this prevention? He is, in the language of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1), entitled to a covenant so framed and so guarded as to afford adequate protection to him whilst at the same time not injurious to the public. I have found myself in considering the extent of this protection without direct guidance upon a point which seems to me of importance. In cases where there is no question of sale of goodwill is an employer entitled to a covenant which will eliminate his former employee from the list of possible competitors for all time and over the whole area of his practice, or is he only entitled to a covenant so limited as to time and place as to deprive the employee of any and every benefit which might accrue to him in the way of connection or reputation or personal knowledge of the customers, and so strip him bare of all advantages and put him on the same level as a stranger? On reflection I think that the latter is the true view, though in applying the latter I would give the employer full measure, so that he may have a period of time and an area of space which will remove any possible advantage; and in the case of an apprenticeship by way of accumulation the time which the apprentice will have occupied in learning the business elsewhere should be taken into account in the period of prohibition, so that it be at least long enough to cover this. So holding, I think a prohibition for life over so large an area unreasonable as being larger than is necessary for the legitimate protection of the employer, and therefore it cannot be supported. It is true that in *Hitchcock* v. *Coker* (2) the Exchequer Chamber supported a covenant by which an employee bound himself for life not to practise within the town of Taunton

(1) [1894] A. C. 565.

(2) 6 Ad. & E. 438.

or three miles round, and that in *Mallan* v. *May*(1) a dentist was held in the Court of Exchequer to his covenant not to practise in London apparently for life. But, on the other hand, in *Sir W. C. Leng & Co.* v. *Andrews*(2) this Court held a covenant by a young reporter not to carry on his business within Sheffield and twenty miles round unenforceable, laying stress upon its being for life as a principal element of unreasonableness.

Then as to area, the recent case of *Mason* v. *Provident Clothing and Supply Co.* (3) shews that so much of London as is in the county of Middlesex and twenty-five miles round may be an unreasonable area. If this covenant had been for a period of years, three, five, or seven, I should not have objected to the size of the area. If it had been limited to not dealing with the clients of the employer or to not dealing with one or two particular institutions or hospitals possibly (though this would be somewhat fanciful); or if the employee had been prohibited from carrying on business in a particular house or even street, I should have been prepared to support it for life. But to hold that this man has precluded himself for all time from practising in any part of the metropolis or even for ten miles round Queen Anne Street, that he may never, for instance, be microscopist to a suburban hospital, is more than I can bring myself to do. No doubt the cream of the business was at the date of the covenant (which is the date at which we must test it) in the Harley Street area, an area of very small diameter. But unfortunately the plaintiff has stipulated for a much larger area, if useless for his protection still possibly injurious to the defendant, and containing a very large portion of the inhabitants of the United Kingdom. I wish that this covenant had been more moderately framed. I wish we could divide it or reduce it; but we can do none of these things, and therefore I think it unenforceable. I wish we could enforce some restriction, for I do not approve of the defendant's conduct, and therefore with both hesitation and regret I must hold that this appeal fails.

Solicitors: *Turner & McCandlish; Ellis, Bickersteth & Co.*

(1) 11 M. & W. 653 (2) [1909] 1 Ch. 763.
(3) [1913] A. C. 724.

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ASTBURY J.

Nov. 25.

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C. A.

Jan. 17, 20.

In re PALACE RESTAURANTS, LIMITED.

[00303 of 1909.]

Company—Winding-up—Practice—Taxation of Costs—Costs incurred before Winding-up—Taxation in Winding-up or under the Solicitors Act, 1843 (6 & 7 *Vict. c.* 73).

This company was ordered to be wound up compulsorily in September, 1909. At that date the company's solicitors had in their hands large sums of money belonging to the company. They repaid a considerable amount to the company or the liquidator, but retained 471*l.* against which they claimed to set off their costs incurred before the winding-up. The official receiver, who was liquidator, took out a summons for delivery of a bill of costs and cash account, taxation, and payment. The registrar made an order, which the solicitors did not oppose, for delivery of a bill of costs and cash account only. The solicitors delivered them, shewing a balance due from them to the company of 13*l.* The official receiver then brought the summons on again for an order for taxation in the winding-up and payment. The solicitors resisted the application, claiming to have their costs taxed under the Solicitors Act, 1843 :—

Held by the Court of Appeal (Lord Reading C.J. and Buckley L.J.), that the solicitors in this case by submitting to the order to deliver a bill of costs had submitted to the jurisdiction for a proper consequential order for taxation and payment in the winding-up. A judge sitting in winding-up matters has jurisdiction to make an order for taxation of costs incurred before the winding-up either under the Solicitors Act, 1843, or in the winding-up.

Decision of Astbury J. affirmed.

By a resolution of the board of directors of this company, passed on July 9, 1909, it was resolved that 250*l.* should be paid to Messrs. C. W. & S. E. Brown, the solicitors to the company, being the agreed fee for their professional services as such solicitors for a period not exceeding three months from the date of the resolution, and that the company should pay in addition all counsel's fees and other out of pocket expenses payable on the company's behalf.

On September 1, 1909, within two months of the date of the resolution, the company was ordered to be compulsorily wound up. On May 26, 1913, the official receiver, acting as liquidator of the company, took out a summons for an order that the solicitors should render to the applicant a statement of all costs incurred by them as solicitors to the said company, together with an account of all moneys received by them on account or otherwise, and that such costs should be taxed and the solicitors ordered to repay to the applicant any money due from them to the company, and to pay the costs of the application.

On June 2, 1913, the registrar made an order that the solicitors should within four days deliver their bill of costs and cash account, and should pay the costs of the summons, but no order was made on the rest of the summons.

It appeared from the evidence on behalf of the official receiver that the books of the company shewed that the solicitors had received from the company cash to the amount of 1271*l.* 2*s.* 4*d.*, but they had repaid to the company or the liquidator 800*l.*, leaving a balance of 471*l.* 2*s.* 4*d.* against which the solicitors would be entitled to set off their costs.

The solicitors did not oppose the order for delivery of a bill of costs and cash account, or appeal from the order. They delivered a bill of costs and a cash account shewing a balance due from them to the company of 13*l.* 15*s.* 10*d.* after payment of their costs.

The official receiver then brought on the summons again and asked for an order for taxation of the costs and payment of the balance due from the solicitors.

The solicitors opposed the application on the ground that there was no jurisdiction to order the costs to be taxed in the winding-up on the application of the liquidator, and that the costs incurred prior to the winding-up ought to be taxed under the Solicitors Act, 1843.

The costs incurred on behalf of the company during the liquidation had been taxed and paid, and no question was raised about them.

The question turned in part upon the construction of the Companies (Winding-up) Rules, 1909. (1)

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(1) Rule 4 (3.): "In every cause or matter within the jurisdiction of the judge, whether by virtue of the Act, or by transfer, or otherwise, the registrar shall, in addition to his powers and duties under the Rules, have all the powers and duties of a Master, registrar, or taxing Master."

The summons was heard before Astbury J. on November 25, 1913.

Austen-Cartmell and *Gavin Simonds*, for the liquidator. The solicitors have assets of the company in their hands for which they are accountable to the liquidator in the winding-up. Against these assets they have a claim for costs. The liquidator is entitled to ascertain the amount of that claim by taxation in the winding-up Court: *In re Foss, Bilbrough, Plaskitt & Foss.* (1)

C. A. Bennett, for the solicitors. In *In re Foss, Bilbrough, Plaskitt & Foss* (1) the solicitors were claiming to prove against the assets for the balance of their costs, so that the winding-up Court had jurisdiction to tax their bills. Neville J. followed *In re Park* (2), a decision of Stirling J. on a similar claim by solicitors in an administration action. The threefold jurisdiction of the Court in these matters was fully explained by Stirling J.

In the present case we make no claim in the winding-up. We have been fully paid and we have assets to the amount of 13*l.* which we are prepared to hand to the liquidator. If the liquidator says we have more assets he must prove his case by proper proceedings. He cannot do this by a summary proceeding in the winding-up Court: *In re Vimbos.* (3) We should not object to taxation under the Solicitors Act, 1843, and make no objection on the ground that the bill has been paid.

ASTBURY J., after stating the facts and the previous proceedings in the matter. continued: The question now before me relates to a claim by the solicitors to have their costs taxed under the Solicitors Act in respect of the period prior to the winding-up, which costs they claim to retain out of the 471*l.* balance for which they are accountable. It appears that the solicitors were pressed after the date of the winding-up order to bring in their account, and it was in consequence of their omission to do so that this summons became necessary. [His Lordship read r. 4 (3.) of the Companies (Winding-up) Rules of 1909, and proceeded :]

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(1) [1912] 2 Ch. 161, 166. (2) (1889) 41 Ch. D. 326, 331.
(3) [1900] 1 Ch. 470, 473.

The solicitors contend that these costs can only be taxed under the Solicitors Act, 1843, and not in the winding-up. They base their contention on the ground that they are not making any claim to prove for costs in the winding-up, and therefore no jurisdiction to tax in the winding-up arises. I think this contention involves a fallacy. The moneys in question which are outstanding in the hands of the company's solicitors became on the winding-up of the company, to the extent that they involved the balance over the true amount of the costs as ascertained by taxation, assets of the company which the official receiver, as liquidator, is entitled and bound to recover. This balance the official receiver is anxious to have ascertained by taxation, and it is admitted that taxation in some form must take place. I think the solicitors must be deemed in this case to be making a claim to retain assets of the company as against the liquidator in the winding-up.

The matter is, I think, determined by the decision of Neville J. in *In re Foss, Bilbrough, Plaskitt & Foss.* (1) In that case a summons was issued by the liquidator of the company therein mentioned, which was in voluntary winding-up, for the taxation of three bills of costs, the first two bills being delivered before the winding-up and the third after the winding-up. The company appeared to have paid the solicitors certain sums in advance for costs, and it was alleged by the solicitors that the company had consented to their retaining these sums in discharge of their bills. Neville J. decided that the retainer of those sums did not amount to payment and therefore preclude taxation of the first and second bills, and continued (2): "The next question is whether the liquidator comes within the provisions of the Act of 1843 at all, or whether the orders made for taxation in a liquidation are independent of the Act." Then after referring to various authorities, including *In re Liverpool Household Stores Association* (3) and *In re Brabant* (4), the learned judge proceeds: "I have ascertained that the order in *In re Brabant* (4) was made under the Solicitors Act, but the practice at present is stated to be that in a winding-up by the Court an order is not made under

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(1) [1912] 2 Ch. 161.
(2) [1912] 2 Ch. 164.
(3) [1889] W. N. 48.
(4) (1879) 23 Sol. J. 779.

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the Solicitors Act, *In re Liverpool Household Stores Association* (1) being followed. . . . . There is some difficulty in treating the case of *In re Brabant* (2) as properly decided under the Act for this reason. In the Act of 1843 the costs are directed to follow the event, i.e., the taxing off or not taxing off one-sixth of the bill, and no discretion appears to be given to the Court unless the order is made under special circumstances. I cannot myself see any sufficient ground for the adoption of a different practice in this regard in the cases of compulsory and voluntary liquidation. A practice has been adopted in compulsory windings-up, which appears to be in accordance with justice, of making the order as a means of ascertaining the amount of the solicitor's claim against the assets, and as a general rule allowing the solicitor to add the costs of taxation to his claim."

I think that applies to the present case. It is perfectly true that in this case the solicitors are not making a claim for further payment against the assets of the company, but they are making a claim to retain untaxed costs against moneys which, subject to their true costs as ascertained by taxation, are undoubtedly assets of the company. It seems to me the reasoning of that case entirely governs the present and I propose to follow it.

The solicitors relied on *In re Vimbos* (3), which was a summons by a liquidator that the amount of remuneration payable to a receiver for debenture-holders might be fixed and that he should be ordered to pay the liquidator any balance remaining in his hands. Cozens-Hardy J. said: "It is not the law that the liquidator can get any claim made by any agent employed by the company assessed in a proceeding like this. Suppose it had been an auctioneer or a stockbroker, who had undoubtedly been employed by the company and who had some money in his hands, I cannot find any authority whatever for the proposition that I could in this summary manner and in winding-up jurisdiction direct that the proper remuneration of the auctioneer or stockbroker should be ascertained, and order him to pay over the balance."

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(1) [1889] W. N. 48.

(2) 23 Sol. J. 779.

(3) [1900] 1 Ch. 470, 473.

I do not think that passage applies in the present case for two reasons. In the first place this is a case of solicitors' bills of costs in respect of which the Court unquestionably has a general jurisdiction, and, secondly, the solicitors have themselves submitted to this jurisdiction by not disputing and by complying with the order of June 2, 1913, delivering bills and cash accounts to the liquidator and not suggesting they are not subject to taxation; the only question being which is the tribunal that must tax the bills. I think the decision of Neville J. is binding upon me on this point, and I direct that the costs be taxed in the winding-up and the solicitors be ordered to repay to the liquidator the balance, if any, which may appear due on that taxation, and I think the solicitors must pay the costs of and occasioned by the adjournment of this summons into Court.

G. R. A.

C. A.

The solicitors appealed. The appeal was heard on January 17, 1914.

Gore-Browne, K.C., and *C. A. Bennett*, for the appellants. A solicitor who has done work before the winding-up is a creditor of the company, but is subject to the twofold power of the Court to tax his costs under the Solicitors Act, 1843, and under the general jurisdiction of the Court to make an order in the winding-up. But the latter only applies when the solicitor comes in and submits to the jurisdiction by making an application in the winding-up. Here the solicitors make no claim. The liquidator is making a claim against the solicitors for the balance in their hands. He ought to sue for it in the ordinary way; then if he wanted the costs taxed, they would be taxed under the Solicitors Act, 1843. We prefer to have them taxed under that Act because they would be taxed at the Central Office before a tribunal accustomed to deal with similar costs.

Rule 4 (3.) of the Winding-up Rules only applies to causes and matters within the jurisdiction of the judge given to him by the Companies (Consolidation) Act, 1908, in the winding-up. In *In re Foss, Bilbrough, Plaskitt & Foss* (1) the solicitors were

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(1) [1912] 2 Ch. 161.

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applying in the winding-up to have their costs paid. In *In re Liverpool Household Stores Association* (1) (quoted in the judgment of Neville J.) Kekewich J. says that the official liquidator is not entitled to have a solicitor's bill taxed under the Act of 1843, but there is no authority for that statement, and Kekewich J. was dealing with cases in which solicitors brought in claims for costs.

[Buckley L.J. referred to *In re Stead.* (2)]

That case shews that the taxation must be by the proper officer. The registrar in winding-up matters is not the proper officer to tax costs except when the solicitor has submitted to the jurisdiction by bringing in a claim. The appellants have only submitted to the jurisdiction so far as delivering a bill goes. They have not submitted to an order for taxation in the winding-up, and to make such an order on the liquidator's application would be to introduce a wholly new practice. If the liquidator applied for taxation of costs he would have to offer to pay the costs found due.

Sir S. O. Buckmaster, S.-G., and *Austen-Cartmell*, for the official receiver. If the taxation were carried on in the Central Office under the Solicitors Act it does not follow that the liquidator would have to offer to pay the costs. In *In re Brabant* (3) Sir George Jessel M.R. stated that "It was not the practice in the case of a company in liquidation to grant the common order to tax, making the liquidator offer to pay what should be found due. In all cases where there was a liquidation a special order was granted with no offer. The solicitor usually had liberty to add the costs of taxation to his bill, with liberty to prove in the winding-up for the amount." The practice there stated by Sir George Jessel and found by Kekewich J. in *In re Liverpool Household Stores Association* (1) is still in force. *In re Marsh* (4) shews that a taxation of costs in bankruptcy is governed by bankruptcy rules, and it follows that taxation in a winding-up should be governed by winding-up rules.

The solicitor is an agent of the company who has money of

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(1) [1889] W. N. 48.
(2) [1910] 2 K. B. 713.
(3) 23 Sol. J. 779.
(4) (1885) 15 Q. B. D. 340.

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the company in his hands, and he could be ordered to pay it into Court under s. 164 of the Companies (Consolidation) Act, 1908.

It makes no difference whether the solicitor is claiming payment of his costs or to retain his costs out of moneys in his hands. The latter is a claim under s. 206 of the Companies (Consolidation) Act, 1908, and would bring the winding-up jurisdiction into force as much as the other. In *In re Allingham* (1) a trustee in bankruptcy applied in the Chancery Division for an order to tax and obtained it. But there the costs were altogether outside the bankruptcy and the bill had been paid.

Gore-Browne, K.C., in reply.

Cur. adv. vult.

1914. Jan. 20. LORD READING C.J. I have had the opportunity of reading the judgment of Buckley L.J., and I agree with it, and therefore it is unnecessary that I should say anything further.

BUCKLEY L.J. The question is whether, upon the application of the official receiver as liquidator in a compulsory winding-up, the Court sitting in winding-up can order taxation of the solicitors' bill of costs against the company for a period before the commencement of the winding-up. The question might arise in either one of two alternatives. First the solicitor may have no cash account but may be a creditor for the whole amount of the bill. Under these circumstances he would have to come in and prove in the winding-up. There is no room for doubt but that in that proceeding it would be competent to the Court in winding-up to ascertain what is the amount due to him. Secondly, the question might arise in a case (such as the present) where, having regard to the cash account, there is a balance due from the solicitor. Under these circumstances he might tender no proof and it would be for the liquidator to enforce against him in a proper manner his liability to pay the amount due from him to the company. If the liquidator brought his action and the solicitor counterclaimed for costs, the judgment would be for the balance to be ascertained by taxation.

(1) (1886) 32 Ch. D. 36.

It was suggested that having regard to s. 164 of the Companies (Consolidation) Act, 1908, the solicitor would not for this purpose be in the position of an ordinary debtor to the company; that the Court or the liquidator (s. 173) could in the winding-up call upon him to pay. This argument I think is not well founded. The Court (s. 164) or the liquidator (s. 173) is entitled to call upon a person falling within s. 164 (and the solicitor falls within it) to pay any money to which the company is prima facie entitled. But if a dispute is raised whether the company is entitled or not there is nothing in the section empowering the Court or the liquidator to determine that question. If the liquidator asserts against the solicitor that the solicitor is indebted to the company, that must be prosecuted I think in the same way as in the case of any other person. It may be therefore that the solicitors in the present case, when the liquidator's summons was issued, might have demurred to the jurisdiction. But they did not do so. An order was taken upon the summons for delivery of a bill, and in submitting to that order the solicitors, I think, submitted to a proper consequential order to give effect to it, that is an order to tax and an order for payment by such party as upon the taxation should be found to be indebted. The case therefore, in my opinion, raises the general question whether the Court sitting in winding-up can order taxation of a bill due before the winding-up.

The judge exercising jurisdiction in winding-up derives his authority from ss. 131 and 132 of the Act of 1908. The jurisdiction is in the High Court, s. 131, sub-s. 1, and the Court having jurisdiction under the Act has for the purposes of that jurisdiction all the powers of the High Court, s. 131, sub-s. 6. The jurisdiction is by virtue of s. 132 assigned from time to time to particular judges of the Chancery Division, but they sit as judges of the High Court and have all the powers of the High Court. If therefore the summons were intituled in the matter of the winding-up and of the Solicitors Act, I have no doubt that the judge might make an order to tax under the Solicitors Act. In the present case, however, the summons is intituled in the winding-up only. But the judge has none the less, in my opinion, jurisdiction to order taxation. The solicitor has no right to insist that his bill shall be taxed under the Act or not at all. This was decided in bankruptcy in the case of a solicitor who tendered a proof in *Ex parte Ditton.* (1) If the twelve months under the Solicitors Act expired before the death, bankruptcy, or winding-up so that taxation could not be obtained under the Act, the executor, or trustee, or liquidator is still entitled to question the amount and to have the proper amount ascertained: *In re Park.* (2) Whether this is by taxation or moderation, or by a direction to inquire as to particular items, is another question. In my judgment the solicitors having submitted to the jurisdiction the liquidator was entitled to an order to tax this Bill in these proceedings, and to a consequential order for payment. The present application does not raise the question whether the one-sixth rule under the Solicitors Act applies or not. If it did arise I should have thought that it would be necessary to consider on the one hand the bearing of Order LXV., r. 27 (38b), and the fact that the summons here is not intituled in the matter of the Act, and on the other hand to notice that the bill in this case was not for a bill of costs incurred by the liquidator, in which case *In re Marsh* (3) might apply, but was for costs incurred before the liquidation as in *In re Allingham.* (4) The only question, however, which we have to decide is whether an order to tax in these proceedings, and an order for payment, is right, where an order for delivery of a bill was made in these proceedings without objection by the solicitor. In my opinion it is. I think the appeal should be dismissed with costs.

Solicitors: *C. W. & S. E. Brown; Solicitor to the Board of Trade.*

(1) (1880) 13 Ch. D. 318.
(2) 41 Ch. D. 326.
(3) 15 Q. B. D. 340.
(4) 32 Ch. D. 36.

J. R. B.

WARRINGTON J.

1914

Jan. 16.

In re WIMPERIS.
WICKEN *v.* WILSON.

[1913 W. 2600.]

Married Woman—Personal Estate—Bequest of Annuity for separate Use without Power of Anticipation—Right to disclaim—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1.

Since the passing of the Married Women's Property Act, 1882, which by s. 1 enables a married woman to acquire and hold property as a feme sole, a married woman is entitled to disclaim a gift to her by will or other disposition of personal property, notwithstanding that the property so given is subject to a restraint on anticipation.

Testatrix gave an annuity to a married woman, during her life for her separate use, without power of anticipation. The annuity was to commence from the death of the testatrix and to be paid quarterly, and the testatrix directed the defendants (whom she appointed executors and trustees of her will) to set apart a fund for securing the annuity, and the testatrix gave the residue of her estate to tenants in common. The testatrix died in February, 1913. In May, 1913, the defendants ascertained that it would be difficult to set aside a fund to answer the annuity without selling leasehold property which the residuary legatees were desirous of retaining. As the result of negotiations between the married woman and the residuary legatees, she agreed to disclaim the annuity in consideration of a lump sum to be paid her by them.

On an application by the married woman for a declaration that she was at liberty to refuse and disclaim the annuity :—

Held that, having done nothing to accept the bequest of the annuity, she was entitled to refuse and disclaim it.

Dictum of Lindley M.R. in *Lady Bateman* v. *Faber* [1898] 1 Ch. 144, 149, explained and distinguished.

ADJOURNED SUMMONS.

Mary Wimperis, by her will dated December 13, 1905, gave all her estate and effects to her sister Emma Ann Wimperis absolutely and appointed her sole executrix.

By a codicil dated November 12, 1908, to her will, which was only to be operative in the event (which happened) of her sister Emma Ann Wimperis predeceasing her, the testatrix appointed the defendants to be executors and trustees of her will, and she thereby gave an annuity of 250*l.* (free of legacy duty) to the plaintiff, Mrs. Edith Wicken, the wife of Alfred Wicken, during her life for her separate use, without power of anticipation, to commence from her death and to be paid quarterly, the first payment to be made at the expiration of three calendar months after her death. And the testatrix directed her trustees to set apart and invest such a sum of money as would when invested produce by the income thereof the said annuity, and to apply the income or if necessary the capital of such fund in payment of the said annuity. And on the cesser thereof the testatrix bequeathed out of the said fund to the plaintiff's husband a legacy of 500*l.* free of duty, and she declared that the residue of the said fund should fall into and form part of her residuary estate. And she thereby gave all the residue of her estate and effects to Edmund Wimperis and Harry E. Wimperis in equal shares as tenants in common.

The testatrix died on February 23, 1913, and her will and codicil were duly proved by the executors on April 9, 1913.

In May, 1913, the executors ascertained that it would be difficult to provide for the payment of the debts of the testatrix and the duties payable on her death and the legacies bequeathed by her codicil and the setting aside of a fund to answer the annuity of 250*l.* bequeathed by the codicil to the plaintiff without selling leasehold property which the residuary legatees were desirous of retaining.

As the result of negotiations between the plaintiff and the residuary legatees the solicitors for the plaintiff on May 31, 1913, sent to the solicitors for the residuary legatees a letter in the following terms:—

"With reference to our conversation on the telephone yesterday we are desired to say that our clients, Mr. and Mrs. Wicken, agree to the following terms:—

"The sum of 4000*l.* to be paid to Mrs. Wicken in satisfaction of her annuity.

"Settlement estate duty (if any) to be paid by Mrs. Wicken.

"Proportion of annuity at 250*l.* per annum to be paid to Mrs. Wicken up to date of settlement, which is to take place on completion of the proposed mortgage of Audley Mansions and Duke Street Mansions to the Alliance Office for approximately 16,000*l.*

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> "At the same time 250*l.* is to be paid to Mr. Wicken in discharge of his legacy.
>
> "If desired by the Messrs. Wimperis, 750*l.* part of the 4000*l.* to be secured by second mortgage on Audley Mansions and Duke Street Mansions with interest at 5 per cent. per annum to be paid off at Christmas next or earlier at the option of the mortgagors.

"We shall be glad if you will kindly write us confirming and in due course let us have drafts of the necessary documents for approval."

On June 3, 1913, the solicitors for the residuary legatees wrote in reply:

"We are obliged by your letter of the 31st ult., and on behalf of our clients we confirm the terms therein set out.

"We are in communication with the Alliance Office, and will in due course let you have drafts of the necessary documents for approval."

The present originating summons was taken out by the plaintiff against the executors and trustees for a declaration that she was at liberty to refuse and disclaim the bequest of the above annuity.

In her affidavit in support of the summons the plaintiff deposed as follows: "I have refused to accept the bequest of the said annuity and I am willing to execute such formal disclaimer as may be necessary to enable the executors to distribute the estate accordingly but the executors are doubtful whether having regard to the fact that the said annuity is bequeathed to me restrained from anticipation such disclaimer would be binding and have therefore raised the question for the decision of the Court."

Clauson, K.C., and *F. H. L. Errington*, for the summons. No one can force a gift on another against his will. The plaintiff having done nothing to constitute an acceptance of the annuity is entitled to disclaim it. The restraint on anticipation does not affect her right to do so inasmuch as it does not operate until after the acceptance of the gift. Disclaimer is nothing more than formal evidence of a refusal to accept a benefit: Davidson's Conveyancing, 3rd ed. vol. v. pt. ii. pp. 662, 663.

[WARRINGTON J. referred to the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, and to the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 7.]

It cannot be that a testator can force a married woman to take onerous property and by imposing a restraint on anticipation prevent her from getting rid of it. The restraint on anticipation does not begin to operate until something passes to the donee upon which it can operate.

In the present case the residuary legatees are making it worth the plaintiff's while to disclaim. The arrangement is one between them and the plaintiff with which the defendants have no concern. [They also referred to Carson's Real Property Statutes, 2nd ed. pp. 317, 524, 594.]

C. Stafford Crossman, for the trustees. There are two distinct points in this case. First, has the plaintiff done anything which disentitles her to disclaim this annuity, and secondly, is she prevented from disclaiming it by reason of the restraint on anticipation? With regard to the first point the question is whether the letter of May 31, 1913, does not constitute an acceptance of the annuity. In *Bence* v. *Gilpin* (1) it was held that the exercise of acts of ownership over the property prevented a disclaimer.

On the second point, apart from equity or the Married Women's Property Act, 1882, the plaintiff being a married woman could not have disclaimed the annuity. It was a chose in action. The right to disclaim must arise if at all from the separate use in the will or from the Married Women's Property Act, 1882. But the separate use is modified by the restraint on anticipation, and s. 19 of the Act says that nothing in the Act shall interfere with a restriction against anticipation. A disclaimer by the plaintiff would be an anticipation.

[WARRINGTON J. Does not the Married Women's Property Act, 1882, alter the status of married women as regards property?]

When each payment of the annuity becomes due the plaintiff can refuse to accept it, but she cannot deprive herself now of the right to receive the annuity in the future. The so-called disclaimer is really a sale of the annuity notwithstanding

(1) (1868) L. R. 3 Ex. 76.

the restraint. As was stated by Lindley M.R. in *Lady Bateman* v. *Faber* (1), " A married woman cannot by hook or by crook . . . . deprive herself of the protection which the restraint on anticipation throws around her."

[WARRINGTON J. If a woman be entitled to be treated as a feme sole why should she not be entitled to disclaim ?]

A disclaimer is not an act, but the evidence of something having happened which prevents a person from afterwards insisting on his right. The question as to the effect of a disclaimer was discussed in *In re Young* (2), where the authorities are reviewed. There is the further point, whether the plaintiff can disclaim the right to have a fund set aside by the trustees to secure the annuity.

The trustees have no wish to stand in the way of the applicant, but only desire to be protected.

Clauson, K.C., in reply. A restraint on anticipation will not prevent a married woman from releasing a power: *In re Chisholm's Settlement.* (3) A restraint on anticipation is a tie imposed on the property when acquired and has no operation against the married woman before she has acquired the property. The statement of Lindley M.R. in *Lady Bateman* v. *Faber* (1) is specifically confined by him to the case of a married woman who has acquired property. As regards the first point taken on behalf of the defendants it is submitted that the plaintiff has not exercised any acts of ownership which preclude her from exercising her right to disclaim. She has not done anything which she could only have done on the footing that the annuity was hers.

WARRINGTON J. This is an application by the plaintiff, a married woman, for a declaration that she is at liberty to refuse and disclaim the bequest of an annuity contained in a codicil, dated November 12, 1908, to the will of Mary Wimperis.

The facts are these: The testatrix appointed the defendants to be executors and trustees of the will and gave an annuity of 250*l.* free of legacy duty to the plaintiff during her life for her separate use without power of anticipation; the annuity was to commence from the death of the testatrix and was to be paid quarterly, the first payment to be made at the expiration of three calendar months after her death; and the testatrix directed the trustees to set apart a certain fund for the purpose of securing the annuity. The plaintiff and the residuary legatees after the death of the testatrix, which occurred on February 23, 1913, laid their heads together to see whether by some means or other the necessity for securing the annuity by setting aside a fund for that purpose could be avoided, and ultimately certain arrangements were made between them.

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(1) [1898] 1 Ch. 144, 149.

(2) [1913] 1 Ch. 272.

(3) [1901] 2 Ch. 82.

Now the plaintiff being restrained from anticipation cannot deal with the annuity, and therefore if the arrangements are carried out by the release of the annuity there will be a difficulty in giving effect to them. Accordingly it is suggested that the plaintiff never having done anything to accept the annuity might disclaim it, and it is contended that if she disclaims it nothing ever vests in her, and there is nothing to be affected by the restraint on anticipation. The question I have to determine is whether that is so.

In the first place I propose to consider the question in the abstract and without reference to the particular facts. Can a married woman to whom by will or by other disposition an interest to which a restraint on anticipation is attached is given disclaim that interest altogether? I have here only to deal with personal estate, and nothing that I say must be taken as referring to real estate as to which other considerations may apply. This is a simple case of a married woman to whom a legacy of personal estate has been given. First, suppose the married woman is not restrained from anticipation, can she disclaim a legacy? Prior to the Married Women's Property Act, 1882, there would have been the difficulty that the married woman herself was not the only person interested in the legacy. Her husband might reduce it into possession, and further if it was not reduced into possession in the lifetime of the wife the husband would upon her death become entitled to it jure mariti. There would therefore prior to the Married Women's Property Act, 1882, have been a difficulty in giving effect to a disclaimer of a legacy by a married woman. If, however, it was given to her for her separate use there was not the same difficulty, for it appears that even before the Act she might have disclaimed it as a feme sole. Since the Married Women's Property Act, 1882, every married woman is under s. 1 of the Act "capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee." There is nothing there said at all about disclaiming or refusing to acquire the property. But if she has the power to acquire the property as a feme sole it seems to me to follow necessarily that she must have power to refuse or disclaim the property as a feme sole. Accordingly I think that since the Married Women's Property Act, 1882, a disclaimer by a married woman of a legacy is effectual.

So far I have dealt with the case of a married woman not restrained from anticipation. But suppose the married woman is restrained from anticipation, does a restraint on anticipation make any difference? It is still property which she has power to acquire and hold as a feme sole. If she acquires it the restraint on anticipation applies, but I fail to see how the fact that if she acquired the property it would be subject to the restraint on anticipation would prevent her from saying "I will not acquire it." I think she is entitled to say "No, I will have nothing to do with it. I decline to take it with the burden imposed on it." It is said, however, that that is contrary to s. 19 of the Married Women's Property Act, 1882. Sect. 19, so far as is material, provides that nothing in the Act contained shall interfere with or render inoperative any restriction against anticipation attached to the enjoyment of any property or income by a married woman under any settlement, agreement for a settlement, will, or other instrument. In the case of a disclaimer the restraint on anticipation never becomes attached to the enjoyment of the property at all because the married woman has not become entitled to the property. It seems to me that the provision in the Act cannot apply to the case of a disclaimer or prevent a married woman from disclaiming the property to which if not disclaimed the restraint on anticipation would attach. I was referred to a passage in the judgment of Lindley M.R. in *Lady Bateman* v. *Faber* (1) in which he makes some strong observations as to the stringent effect of a restraint on anticipation. He says: "A married woman cannot by hook or by crook—by any device, even by her own fraud (the cases go that length)—deprive herself of the protection which the restraint on anticipation throws around her. About the policy of the law I will say nothing, but it has been sanctioned by the Married Women's Property Act. The result is that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a feme sole." It was contended that what was proposed to be done in this case was a device to enable a married woman to deprive herself of the protection of the restraint on anticipation and that, in the words of Lindley M.R., she cannot do so "by hook or by crook." The Master of the Rolls, however, in stating the result is careful to say "that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a feme sole." But in the present case if the married woman has in fact declined the gift she never had an estate for her separate use and has never been subject to the restraint on anticipation, and the remarks of Lindley M.R. are not applicable. In my judgment, therefore, a married woman may since the passing of the Married Women's Property Act, 1882, disclaim a gift to her of personal estate although it is given to her with a restraint on anticipation. I think, therefore, that a disclaimer under these circumstances would be valid.

Then is the disclaimer in the present case valid? The testatrix died on February 23, 1913. No payment of the annuity has been made. The plaintiff in her affidavit states "I have refused to accept the bequest of the said annuity and I am willing to execute such formal disclaimer as may be necessary to enable the executors to distribute the estate accordingly." I have no doubt at all that the desire to refuse is the result of a bargain made between her and the residuary legatees—not a bargain between her and the executors, but between her and

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(1) [1898] 1 Ch. 144, 149.

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persons who are for this purpose outsiders—by which she is to receive certain benefits, not those given by the will. It is also beyond dispute that the bargain was the result of certain negotiations in the course of which a letter was written by her solicitors on May 31, 1913, in which they say that she has agreed to the following terms: [His Lordship read the terms of the letter above set forth and continued :] What is suggested by the trustees is that the effect of the negotiations and correspondence is that they are evidence that she had accepted the legacy. That is the contention, because if she had accepted she could not have disclaimed. Is that really so? The desire of the parties was to substitute something else for the annuity. How the substitution was to be effected was not determined. I think on the whole that it would be going too far to say that in proposing to accept something in substitution the plaintiff must be treated as having accepted the annuity and as proposing to assign and release it. I take it that at the time of the correspondence she had not made up her mind to accept the annuity. The matter was still in abeyance and she has now definitely made up her mind not to accept it. I hold, therefore, that she is entitled to disclaim the bequest.

The proper form of order will be: "The plaintiff by her counsel stating that she refuses and disclaims the bequest to her of the annuity of 250*l.* made by the codicil of November 12, 1908, Declare that notwithstanding the restraint on anticipation attached to the annuity such refusal and disclaimer are effectual and release the defendants and the estate of the testatrix from any claim in respect of the annuity and from any liability to provide for the annuity by setting apart a fund or otherwise."

Solicitors: *Cooper, Bake, Roche & Fettes; Lee & Pembertons.*

W. I. C.

In re SIR WILLIAM MILLER.
In re SIR JAMES MILLER.
BAILIE *v.* MILLER.

[1913 M. 1247.]

Conflict of Laws—Scottish Instrument comprising Scottish and English Land—Heirs-male of the Body in Fee—Lex Loci—Estate in Tail Male in English Land.

By trust disposition made in Scottish form and executed in manner required by English law for the execution of wills, W. M. gave his whole estate, real and personal, to trustees, to allow his wife (who died in 1912) the life-rent use of his mansion house No. 1, Park Lane, London, and subject thereto directed his trustees to hold his estate of Manderson in Scotland, as also his house No. 1, Park Lane, with the whole pictures, books, linen and household plenishing of every description in the mansion house of Manderson and in No. 1, Park Lane, and his silver plate, wherever it might be, for behoof of his eldest son, James, "and the heirs-male of his body in fee"; whom failing, John, his second son, "and the heirs-male of his body in fee," with divers limitations over.

W. M., who was seised of No. 1, Park Lane, for an estate in fee simple, died in 1887. James died in 1906, without issue and without having executed any disentailing assurance of No. 1, Park Lane, but having made a trust disposition in Scottish form executed in manner required by English law for the execution of wills, by which he disposed of the whole of his real and personal estate.

Evidence of the law of Scotland applicable to the circumstances was given to the effect that the terms of the trust disposition of W. M. were ineffectual to create a strict entail; that the interest of John and his heirs thereunder was that of heirs substitute only, and was defeasible at the will of James, who was entitled (subject only to the life interest of his mother) to deal with or dispose of the premises by any habile conveyance either inter vivos or mortis causa; and that by his trust disposition James had according to the law of Scotland effectually disposed of the premises:—

Held, that as to No. 1, Park Lane the trust disposition of W. M. created an estate in tail male in James without any power of disposition other than that conferred by English law, and that, in the events which had happened, No. 1, Park Lane passed to John for an estate in tail male.

Studd v. *Cook* (1883) 8 App. Cas. 577 distinguished.

ADJOURNED SUMMONS.

By a trust disposition and settlement made in Scottish form dated January 6, 1876, and executed in the presence of two witnesses in manner required by English law for the execution of wills, Sir William Miller gave his whole estate, heritable and movable, real and personal, to trustees, in trust to allow his wife, Dame Mary Miller, the free life-rent use of (inter alia) his mansion house No. 1, Park Lane, London, and subject thereto he directed his trustees to hold "my estate of Manderson, and the whole other lands and heritable estate or real estate of every description within the shire or county of Berwick, belonging to me at the time of my death, as also my house No. 1, Park Lane, London, with the whole pictures, books, linen and household plenishing of every description in the mansion house of Manderson and in said house No. 1, Park Lane, London, and my silver plate, wherever it may be, for behoof of my eldest son, James Percy Miller, and the heirs-male of his body in fee; whom failing, John Alexander Miller, my second son and the heirs-male of his body in fee; whom failing, the heirs-male of my body in the order of their seniority, and the heirs-male of each of their bodies in their order respectively in fee; whom failing, to my daughters in the order of their seniority and the heirs-male of each of their bodies respectively in the order of their seniority in fee; whom failing, the heirs-female of my sons in the order of their seniority in fee; whom failing, the heirs-female of my daughters in the order of their seniority in fee, the eldest heir-female always succeeding throughout the whole course of succession and secluding heirs-portioners . . . . My trustees shall manage, as absolute proprietors, my estates in Berwickshire and house in London for the party entitled thereto under these presents until said party attains the age of twenty-five years, my said trustees, subject to the before-written provision in favour of my said wife, allowing such party such occupation of the whole or any part thereof as they may consider best; and upon said events happening my said trustees shall denude of said lands and estates in favour of the party to whom the same are respectively destined . . . ."

Sir William Miller, who was seised of No. 1, Park Lane, for an estate in fee simple, died on October 10, 1887, and his trust disposition and settlement (together with three codicils not affecting the disposition of No. 1, Park Lane) was duly recorded in the books of Council and Session in Scotland and confirmation thereof duly obtained in Scotland and resealed in the Principal Registry of the Probate Division of the High Court of Justice in England.

By a trust disposition and settlement made in Scottish form dated December 4, 1901, and executed in the presence of two witnesses in manner required by English law for the execution of wills, Sir James Percy Miller gave to trustees all his estates and effects, heritable and movable, real and personal, of every description and wherever situated, then belonging or which should belong to him at the time of his death, to trustees upon trusts under which large benefits were conferred upon Sir John Alexander Miller and under which the defendant Evelyn Mary Hunter took certain interests, and a power of sale was thereby conferred on the trustees.

Sir James Percy Miller died on January 22, 1906, aged forty-one years, without leaving any issue and without having executed any disentailing assurance of No. 1, Park Lane; and his trust disposition and settlement was duly recorded and confirmation thereof duly obtained in Scotland and resealed in England.

Dame Mary Miller died in 1912.

The trustees of the trust disposition and settlement of Sir James Percy Miller had lately contracted to sell No. 1, Park Lane. The purchaser raised an objection to the title on the ground that the trust disposition and settlement of Sir William Miller created an estate tail in the property, and required under the circumstances that Sir John Alexander Miller should execute a disentailing assurance and join in the conveyance to the purchaser. This he did; and the purchase was completed and the purchase-money, amounting to the sum of 14,000*l.*, had been placed on deposit with a bank to abide the result of these proceedings.

This originating summons was then taken out by the trustees of the trust disposition and settlement of Sir James Percy Miller against Sir John Alexander Miller and Evelyn Mary Hunter, as defendants, raising the questions (1.) whether Sir James Percy Miller was at the date of his death seised of No. 1, Park Lane for an estate in fee simple or for any other estate which entitled him to dispose of the said premises by his will or whether on his death the said premises vested in Sir John Alexander Miller for an estate in tail male or for any other and what estate; and (2.) whether, in the latter case, Sir John Alexander Miller was bound to elect between the benefits conferred on him under the trust disposition and settlement of the said Sir James Percy Miller on the one hand and the estate in No. 1, Park Lane devised to him by the trust disposition and settlement of Sir William Miller on the other hand.

Evidence of the Scottish law applicable to the circumstances was given by a Scottish advocate who stated in his affidavit as follows:

"In these circumstances and on the assumption that the said freehold premises had been situated in Scotland and that the destination thereof and the succession thereto fell to be regulated and governed by Scots law I am of opinion as follows:—

"(*a*) That according to Scots law under Sir William's trust disposition and settlement and codicils right in and to the said freehold premises was vested in Sir James at the time of his death.

"(*b*) That said right vested in Sir James on his attaining twenty-five years of age.

"(*c*) That said right so vested in Sir James absolutely and subject only to his mother's life-rent interest.

"(*d*) That the terms of the said trust disposition and settlement are ineffectual according to Scots law to create a strict entail. If a strict entail had been created Sir James Percy Miller would not have been entitled to deal with or dispose of the estate except by first having recourse to statutory procedure and disentailing same.

"(*e*) That according to Scots law the terms of the destination to John Alexander Miller and the heirs male of his body in fee upon failure of James Percy Miller and the heirs male of his body in fee created in the events which have happened a substitution in favour of John Alexander Miller and his said heirs, the right or interest of the said John Alexander Miller and his said heirs in and to the premises in question being that of heirs substitute only.

"(*f*) That the right or interest of the said John Alexander

Miller and his said heirs under and in virtue of the said substitution was defeasible at the will of the said James Percy Miller and that the said James Percy Miller who survived the date of vesting was entitled (subject only to the life-rent interest of his mother) to deal with or dispose of said premises by any habile conveyance either inter vivos or mortis causa.

"(*g*) That unless defeased as aforesaid the said substitution would however according to Scots law remain operative to carry said premises to John Alexander Miller and his said heirs on the death of Sir James and the failure of heirs male of his body and

"(*h*) That by his trust disposition and settlement and codicils Sir James Miller has according to Scots law effectually disposed of the said premises and his whole right and interest therein by the disposition in said trust disposition and settlement contained of his whole residuary real and personal estate, and that the said Sir James Miller according to Scots law has thereby entirely defeased or evacuated the said substitution and any right or interest thereunder as heirs substitute of the said John Alexander Miller or his issue."

Clauson, K.C., and *J. F. Carr*, for the plaintiffs. The obvious intention of the trust disposition and settlement of Sir William Miller is that the land in Scotland and No. 1, Park Lane are to go in the same way to the same persons. There is no doubt that if the words are to be construed according to the law of England Sir James Miller took an estate tail in No. 1, Park Lane, but *Studd* v. *Cook* (1), which is the converse case to the present, shews that the words are to be construed not according to the law of England but according to the law of Scotland. It is a mere accident that the Scottish instrument uses expressions familiar to the law of England. They have to be interpreted from the foreign law into English in the same way as if they were entirely foreign expressions. There is no question on the evidence as to the result of the law of Scotland which in the existing circumstances gave a power of disposition by deed or will to Sir James Percy Miller. There is nothing in the English lex loci to prevent the Court from giving a similar effect to the disposition, treating it either as a limitation to Sir James Percy Miller absolutely with power to appoint by deed or will, coupled with a gift over if he dies without leaving issue and without exercising his power of disposition, or as a limitation to Sir James Percy Miller in tail male coupled with a power of appointment in case he should leave no issue. If there is no apt limitation to give effect to the construction according to the law of Scotland we should be equally entitled to succeed on the footing of an intestacy, since Sir James Percy Miller was the heir-at-law of Sir William. For the purposes of our argument, however, it matters not whether the intended limitations in default of disposition by Sir James Percy Miller can or cannot be given full effect to according to the law of England; it is enough for our purpose that Sir James Percy Miller was intended to have a power of disposition to which effect can be given. In order to give due effect to the foreign construction the words must be expanded and must be treated as though they defined the estate with its incidents according to their foreign construction and be applied not merely to create an estate but to define the interests and powers intended to be enjoyed in the English land: *Studd* v. *Cook.* (1) [They also cited *Di Sora* v. *Phillipps* (2) and *Bradford* v. *Young.* (3)] If Sir James Percy Miller had power to dispose of the property, *In re Harman* (4) shews that according to English law his trust disposition exercised that power.

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(1) 8 App. Cas. 577.

J. F. W. Galbraith, for Evelyn Mary Hunter, supported the same argument and cited Dicey's Conflict of Laws, 2nd ed. p. 60.

Cave, K.C., and *G. R. Northcote,* for Sir John Alexander Miller. No question of construction according to the law of Scotland arises on the trust disposition of Sir William Miller. The words "in fee" are as consistent with a fee tail as with a fee simple: Williams on Real Property, 14th ed. p. 45; but, even if the words "in fee" are to be read as equivalent to "and their heirs" tacked on to the words "heirs-male of the body," the estate thereby created is still an estate tail: *Underhill* v. *Roden.* (1) The words "heirs-male of the body" are technical words in the lex loci and cannot yield to any contrary intention derived from considerations of foreign law. There is no difficulty in construing the same limitation in a different way as applied to land in England and as applied to land in Scotland: *Forth* v. *Chapman.* (2) But in any case the argument on behalf of the plaintiffs only comes to this, that Sir William Miller intended to impose on the estate tail as known to the law of England incidents which that law rejects, since according to English law a tenant in tail has no power to defeat his successors except by a disentailing assurance under the Fines and Recoveries Act. *Studd* v. *Cook* (3) does not support the argument which is attempted to be founded upon it. In that case the House of Lords only decided that, in an English will disposing of Scottish heritage but couched in English technical terms unknown to the law of Scotland, the meaning of the English expressions might be regarded as rebutting a Scottish rule of presumptive construction. Nothing was decided as to the effect of a gift "in tail" or to the "heirs of the body," and the observations of Earl Selborne L.C. in that case are in our favour. Moreover the power of disposition contended for would not be a general power within s. 27 of the Wills Act, 1837, and the trust disposition of Sir James Percy Miller, therefore, in which there is no reference to the power or the property, would not according to the law of England amount to a disposition of No. 1, Park Lane, even if he had power to dispose of it.

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(1) 8 App. Cas. 577.

(2) (1863) 10 H. L. C. 624.

(3) (1884) 26 Ch. D. 656; on appeal (1885) 29 Ch. D. 617.

(4) [1894] 3 Ch. 607.

Clauson, K.C., in reply.

WARRINGTON J. The question in this case is whether Sir James Percy Miller was tenant in tail male of a house No. 1, Park Lane, or whether he had some estate the nature of which it is impossible to describe but which at all events gave him a power of disposition by will. When I say "impossible to describe" I mean impossible to describe as an estate according to the rules of English law. It might be possible to work out the interests of the several parties by making an elaborate settlement of the house, but I cannot in terms of English law describe the estate to which according to the argument Sir James Percy Miller became entitled in this house.

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(1) (1876) 2 Ch. D. 494.
(2) (1720) 1 P. Wms. 663.
(3) 8 App. Cas. 577.

The facts are these: [His Lordship stated the facts and read the material part of Sir William Miller's trust disposition and settlement, and continued:] The question now arises between those who would take under the trust disposition and settlement of Sir James Percy Miller if it included No. 1, Park Lane and those who would take if the limitation in Sir William Miller's will created an estate in tail male according to English law in Sir James Percy Miller. That is the question which I have to decide.

The will is undoubtedly a will in Scottish form including English immovables. It is said that the document being in Scottish form I must with reference to English land as a matter of construction give the same meaning to technical terms as would be given to them in a will in Scotland. The question really is not so much what is the construction of the will, but what is the estate conferred by the disposition in question after I have arrived at its true construction. The testator here has used expressions which undoubtedly are technical and proper expressions for creating an estate in tail male in English land. He has disposed of the house in Park Lane to trustees in trust for his son James Percy Miller and "the heirs-male of his body." It is quite true that he has added the words "in fee," but those words have no special technical meaning in English law distinguishing an estate in fee simple from an estate in fee tail. They are as appropriate to the creation of an estate in fee tail as they are to an estate in fee simple, and in my judgment the addition of those words makes no substantial difference in the technicality of the expressions which the testator has used. He has therefore in express terms created an estate in tail male according to English law; but it is said that the estate which those terms would by Scottish law create would be an estate tail having different incidents from those which by English law an estate tail would have in England. The argument, though it professes to be an argument on the construction of the document, is really based on this, namely, that the estate created by those words in Scotland would have different incidents from the estate created by the same words in England; but there is no authority or principle which binds me to decide that because the will is made in Scottish form and includes land in Scotland therefore words which would create an estate with one set of incidents in Scotland must create an estate with the same set of incidents in England. Indeed I am bound to decide in an exactly contrary way, because the incidents of the estate which can be created in English land must be determined by the law of the country where the land is situated and not by the law of the country where the testator is domiciled or where the will is made. The decision of the House of Lords in *Studd* v. *Cook* (1), which has been so much relied upon by counsel for the plaintiffs, is in my opinion in no way inconsistent with the view which I have expressed. The facts of that case were as follows: A testator domiciled in England was possessed of land both in England and Scotland. He made a will according to English law by which in terms appropriate to English law he devised "all such and such parts of my manors, messuages, lands, and hereditaments situated in the counties of Devon, of Inverness in Scotland, of Stafford and of Warwick, and of my estates called the Four Dwellings, the Quinton, and the farm at Bell End, whether in Worcestershire or Staffordshire, or elsewhere, as consist of freehold of inheritance . . . . to the use of my elder son Edward Fairfax Studd and his assigns, for his life, without impeachment of waste, and after the death of the said Edward Fairfax Studd to the use of the first and every other son of the said Edward Fairfax Studd, successively, according to their respective seniorities, in tail male" with remainders over, so that in that case, as in this, the testator combined a devise of his Scottish estates with a devise of his English estates. The question which arose in *Studd* v. *Cook* (1) was whether the testator's son who by the devise in question was made tenant for life took the Scottish estates for life only or whether he took them for an estate which would give him practically an estate in fee simple, it being the law of Scotland that the mere limitation to a parent in life-rent and after his death to unborn and unnamed children in fee confers a fee simple on the parent, and it was contended that that rule must be applied to the land in Scotland. But when the rule came to be examined it was found that that rule was not a rule like that in English law limiting an estate in tail male by the use of the words "heirs of the body," but was a rule which would yield to any expressions of contrary intention, and that the insertion in the limitation of the life-rent of the word "allenarly" or the English word "only" would have the required effect. Then the House of Lords in effect said, this being an English will and the devise of the Scottish estates being included in the devise of the English estates, the will must be construed according to English law, and construing it according to English law, the life estate was a life estate and a life estate only, and therefore it was legitimate to read the will in its application to the Scottish estates as if the word "only" had been inserted, which gave a perfectly intelligible effect to what we should call the "devise" and what the Scots would call the "disposition," without infringing any technical rule of Scottish law applicable to immovable property. That decision in my opinion has no application to the present case. There is no difficulty in the present case arising on the construction of the words which with reference to lands of inheritance in England create a well-known estate with certain incidents. Is the estate so created to have those incidents or is it to have some incidents unknown to English law? I think that question is really answered by a part of the speech of Earl Selborne L.C. in *Studd* v. *Cook* (1), where he said: "I hold it to be clear that neither the use of English terms of art, nor the intention to create, in Scotland, an estate as nearly as possible corresponding to an English estate tail, ought to prevent such dispositions from operating in Scotland to the fullest extent to which, by the law of Scotland, they can operate. There is no reason why the intention should fail altogether because some consequences of it, which the testator may have had in contemplation, cannot take effect." Then comes this passage which is the important one : "The incidents and consequences of the estate or estates which, under such a form of gift, may vest in the donees, according to Scottish law, must, of course, be determined by that law and not by the law of England. But the fact that a donee, who, in England, would take under those words an estate tail, capable of being barred under the Act for the Abolition of Fines and Recoveries, and not otherwise, would, in Scotland, be a fiar, without fetters—or that, in England, he would have only limited statutory powers of leasing beyond his life, while, in Scotland, his powers would be unlimited—is no reason why the destination itself to him and the heirs male of his body, and to the rest of the hæredes designati in succession, should not take effect in Scotland, as far as by law it may." Applying those words to the present case, the fact that the incidents of the estate tail in Scotland may be different from the incidents of the estate tail in England is no reason why that estate should not take effect in England according to the law of England ; and that in my opinion is the correct footing on which to deal with the question. If I am not to deal with it on that footing, then I am driven to the conclusion that the testator did not intend according to English law to create any estate at all in the premises in Park Lane, but that he intended to direct his trustees to hold these premises upon certain trusts, the nature of which it would be extremely difficult to express but which would involve a power of appointment by deed or will in Sir James Percy Miller with certain trusts for his issue—the precise nature of which it would also be extremely difficult to ascertain—in default of appointment. In my view that is not the function of this Court. The duty of the Court is to ascertain the nature of the estate in the English land created by these apt technical terms, and that in my opinion is an estate tail, and can only be an estate tail.

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(1) 8 App. Cas. 577.

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(1) 8 App. Cas. 591.

[His Lordship accordingly answered the first question raised by the summons by declaring that, on the true construction of the trust disposition and settlement of Sir William Miller and in the events which had happened, No. 1, Park Lane passed to Sir John Alexander Miller for an estate in tail male. As regards the

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second question raised by the summons his Lordship held that, on the true construction of the trust disposition and settlement of Sir James Percy Miller, he did not purport to dispose of No. 1, Park Lane, and therefore no question of election arose.]

Solicitors: *Kennedy, Ponsonby, Ryde & Co.; Bircham & Co.*

A. C.

EVE J.
1914
Jan. 16.

In re LANCASHIRE AND YORKSHIRE BANK'S LEASE.
W. DAVIS & SON *v.* LANCASHIRE AND YORKSHIRE BANK.

[1913 L. 2478.]

[LIVERPOOL DISTRICT REGISTRY.]

Landlord and Tenant—Lease for Five Years—Construction—Proviso—Determination "after expiration of first three years"—Notice—Validity.

By a lease dated February 21, 1911, certain premises were demised by the defendants to the plaintiffs for a term of five years from March 25, 1911, at a yearly rent of 225*l.* to be paid by equal quarterly payments on the usual quarter days. The lease contained a proviso that "after the expiration of the first three years of the term hereby granted, if the lessees shall desire to determine this lease, and shall give to the lessors six calendar months' previous notice in writing of such desire, such notice to determine on any quarter day, ... then and immediately on the expiration of such notice this present demise shall cease and be void."

On November 14, 1913, the plaintiffs gave notice in writing to the defendants that it was their intention to quit and deliver up possession of the premises on June 24, 1914. On a summons taken out by the plaintiffs to determine whether the notice was good:—

Held, that the case was indistinguishable from *Gardner* v. *Ingram* (1889) 61 L. T. 729, and the notice in question was invalid. The earliest day on which the lease could be terminated was September 29, 1914.

ADJOURNED SUMMONS.

By an indenture of lease dated February 21, 1911, made between the defendants, the Lancashire and Yorkshire Bank, and the plaintiffs, W. Davis & Son, the ground floor messuage or shop and yard No. 381, Lord Street, Southport (excluding all rooms above the ground floor), was demised by the defendants to the plaintiffs for a term of five years from March 25, 1911, determinable as thereinafter provided, at the yearly rent of 225*l.*, to be paid by equal quarterly payments on June 24, September 29, December 25, and March 25 in every year of the tenancy, the first of such payments to be considered due on March 25, 1911, and every succeeding quarter's rent to become due and be payable (if required) and recoverable in advance. The indenture contained a provision that "if at any time during the said term" the lessors, or their assigns, should determine to pull down and rebuild the premises thereby demised, the lessors, or their assigns, might determine the term thereby granted at any time upon any quarter day by giving to the lessees six previous calendar months' notice in writing, and upon the expiration of such notice the demise should cease and be void. The indenture also contained a further provision in the following terms:—"And it is further agreed and declared that after the expiration of the first three years of the term hereby granted, if the lessees shall desire to determine this lease, and shall give to the lessors six calendar months' previous notice in writing of such their desire, such notice to determine on any quarter day, and shall, up to the time of such determination, pay the rent and perform and observe the covenants on their part hereinbefore contained, then and immediately on the expiration of such notice this present demise and everything herein contained shall cease and be void, but without prejudice to the remedies of either party against the other in respect of any antecedent claim, or breach of covenant." On November 14, 1913, the plaintiffs gave a notice in writing to the defendants' agent stating that, in accordance with the option contained in their lease, they thereby gave notice that it was their intention to quit and deliver up possession of the messuage and shop in question on June 24, 1914. The plaintiffs contended that according to the true construction of the lease they had power to determine the same on June 24, 1914, on giving six months' previous notice in writing, and that the notice given on November 14, 1913, was good and effective for the purpose. The defendants' contention was that no notice to determine the lease could be given prior to the expiration of three years of the said term, namely, March 24, 1914.

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The plaintiffs thereupon took out an originating summons on December 22, 1913, for the determination of the question whether, on the true construction of the lease, they were entitled to determine the lease on June 24, 1914, on six calendar months' previous notice given before March 25, 1914, and for a declaration of the rights of the parties.

Courthope Wilson, for the plaintiffs. According to the lease the plaintiffs are entitled to determine the tenancy on any quarter day after the determination of the three years, by giving six months' notice. There is nothing in the proviso as to the time of giving notice, only as to the determination of it. It is not like the case of *Thompson* v. *Maberly* (1), where there was a term certain fixed; nor is it on all fours with *Gardner* v. *Ingram* (2), where there were special words that the determination of the term must be on the corresponding quarter day at which the tenancy commenced, so that it could not determine until the end of the fourth year. The notice there given was one to determine "at" and not after the expiration of the first three years. Here it may be on any quarter day. The notice is therefore good: *Bird* v. *Baker* (3); *Wride* v. *Dyer*. (4) If there is any ambiguity in the proviso it should be construed against the lessors.

J. Rutherford, for the defendants. The distinction attempted to be drawn between this case and *Gardner* v. *Ingram* (2) is not sound. That case is precisely in point and governs the present. The case of *Sidebotham* v. *Holland* (5) also supports my contention. The proviso here does not come into operation at all until after the expiration of the three years; it is only after that time that the lessees can give the six months' notice in writing. There is no case of hardship. The words must be construed as they stand, and the earlier proviso in the lease shews that where the parties intended that a notice could be given "at any time during the term" it is so expressed. A somewhat similar question arose under an agreement in the case of *Cannon*

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(1) (1811) 2 Camp. 573.
(2) 61 L. T. 729.
(3) (1858) 1 E. & E. 12.
(4) [1900] 1 Q. B. 23.
(5) [1895] 1 Q. B. 378, 383.

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Brewery v. *Nash* (1), and the same reasoning would apply to leases. I say the notice given here is bad for all purposes, but it is open to the plaintiffs of course to give a proper and effective notice: *Langton* v. *Carleton.* (2)

Courthope Wilson, in reply, distinguished *Langton* v. *Carleton* (2) and referred to *Page* v. *More.* (3)

[Eve J. referred to *In re John Brinsmead & Sons* (4), where a similar point arose upon the construction of an agreement of service.]

Eve J. If this question of construction were free from authority, I am by no means certain that my decision would take the form which, since there is authority upon the point, I feel that it must take. I think, after a careful examination of the proviso in the lease here, it is impossible to distinguish this case from that of *Gardner* v. *Ingram* (5), upon which Mr. Rutherford relies.

I need not read the proviso over again, but it comes, I think, to this, that the term thereby created shall cease and determine if, after the expiration of the first three years thereof, the lessees shall so wish, and shall give to the lessors six calendar months' notice in writing of that wish, and then, in their favour, there is added this, that such notice need not expire on the anniversary of the day on which the tenancy commenced, but may expire on any one of the usual quarter days.

So read, the clause in this lease is indistinguishable from the clause construed in *Gardner* v. *Ingram* (5) by Lord Coleridge C.J. and Bowen L.J.

Mr. Courthope Wilson has endeavoured to distinguish the two cases on the ground that whereas in this case the notice to be given may expire upon any quarter day, in *Gardner* v. *Ingram* (5) the notice could only be effective if it expired on the anniversary of the quarter day on which the term commenced, and from this he argues that whereas in this case the notice in fact would take effect after the expiration of the first three years of the term, the notice in *Gardner* v. *Ingram* (1), being given for the third anniversary of the day on which the tenancy commenced, was, in substance, a notice to determine "at" and not "after" the expiration of the first three years. This element, he urges, sufficiently distinguishes the two cases. The point he takes was not mentioned in *Gardner* v. *Ingram* (1), but it is, I think, disposed of by what was said by Lindley L.J. in delivering the judgment of himself and Lord Halsbury in the case of *Sidebotham* v. *Holland* (2), where he points out that a notice to determine an annual tenancy commencing on or from a particular day in one year is a good notice if given for the day immediately preceding the anniversary in another year. From this it follows that in *Gardner* v. *Ingram* (1) the three years could properly be treated as expiring at midnight on September 28, and the notice for the 29th as taking effect after that expiration, and if so the point on which Mr. Courthope Wilson seeks to distinguish the two cases vanishes.

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(1) (1898) 77 L. T. 648.
(2) (1873) L. R. 9 Ex. 57.
(3) (1850) 15 Q. B. 684.
(4) (1912) 56 Sol. J. 253.
(5) 61 L. T. 729.

For these reasons I come to the conclusion that the contention of the landlords here is right, and that, on the summons, I must hold that the notice purporting to determine this tenancy on June 24, 1914, is invalid, and that the earliest date on which the lessees can determine the tenancy is September 29, 1914. The costs must follow the result.

Solicitors: *Labron Johnson & Son, Liverpool; Mawdsley & Hadfield, Southport.*

(1) 61 L. T. 729.

(2) [1895] 1 Q. B. 378.

G. M.

HONG KONG AND CHINA GAS COMPANY, LIMITED *v.* GLEN.

SARGANT J.
1914
Feb. 12, 14, 20.

[1913 H. 927.]

Company—Shares—Contract to give Vendor fully-paid Shares on each Increase of Capital—Joint Stock Companies Act, 1856 (19 *&* 20 *Vict. c.* 47), *ss.* 5, 61—*Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 8, 38—*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 3, 123.

A company, limited by shares and incorporated either under the Joint Stock Companies Act, 1856, or the Companies Act, 1862, cannot, for a fixed present consideration, validly contract that an indefinite amount of further share capital shall from time to time be issued upon the terms that all liability thereon for calls shall be at once extinguished without any contemporaneous payment by the allottees.

A company, limited by shares and incorporated under the Joint Stock Companies Act, 1856, was by its articles of association authorized to enter into an agreement with G. By this agreement, which was entered into immediately after the incorporation, it was agreed that a concession granted to G. for the supply of gas to a city in China should be transferred and sold to the company free from any competition by the vendor; that in case the vendor should acquire any like concessions for any other places in China he would not dispose thereof to any other party without first giving the company an opportunity of acquiring them upon the same terms; that the company would within three months allot to the vendor 400 shares of 10*l.* each in the company's capital (not exceeding 20,000*l.*), and would provide 4000*l.* to be immediately applied in paying up the 400 shares in full, and (clause 8) that "if and whenever the amount of the company's paid up capital shall be increased above the sum of 20,000*l.*, the company will allot to G., his executors, administrators and assigns, such further number of shares as shall be equal to one-fifth part of the increased capital so from time to time actually paid up beyond the said sum of 20,000*l.*, and will pay to him or them, or to" certain named persons, "as the nominees of him or them, a sum equal to the nominal amount of the shares so allotted to him or them, which sum or sums so paid shall from time to time be immediately applied in paying up in full the shares so allotted." The transfer to the company was carried out, and the 400 shares were allotted and paid up according to the agreement. Further issues of shares were made in subsequent years, when the claim of G. to receive one-fifth of each increase of capital was recognized, and in respect of such shares as he took, the amounts were paid up with moneys of the company. G. having died, an action was brought for the decision of the question whether the company was bound to allot to his executors one-fifth of each future increase of capital, and, if so, on what terms:—

Held, that clause 8 was good so far as it created an obligation to allot to the vendor, his executors, administrators, or assigns, one-fifth of the increased capital from time to time, but bad so far as it purported to relieve the allottee or allottees from liability to pay up all or any part of the nominal amount of such share capital.

THE Hong Kong and China Gas Company, Limited, was incorporated under the Joint Stock Companies Acts, 1856, 1857, and 1858, in June, 1862, with a capital of 35,000*l.* divided into 3500 shares of 10*l.* each. The objects of the company were (amongst others) to manufacture, supply, and sell gas in the city of Victoria, Hong Kong, and other cities and places in China; to carry on the business of a gas company in those cities and places or any of them; to make and sell coke and other products; and to obtain charters, grants, and concessions from Her then Majesty's Imperial or Colonial Government, the Governor of Hong Kong, the Government of China, and other governments and authorities, to hold lands, and exercise the rights and powers of a body corporate or public company. Clause 5 of the articles of association provided that "no shares shall be issued at a discount unless with the authority of a special general meeting of shareholders duly convened for the purpose." By clause 24 the company was empowered to increase its capital. By clause 53 the directors of the company were specially authorized to make and enter into a contract (a copy of which was scheduled to the articles) with William Glen and Thomas Glen.

The contract referred to in clause 53 was contained in certain articles of agreement which were dated July 14, 1862, and were made between William Glen of the first part, Thomas Glen of the second part, and the company of the third part. By that agreement, after recitals which shewed that William Glen had obtained a concession for supplying the city of Victoria, Hong Kong, with gas, that this concession had been transferred to Thomas Glen, and that the latter was prepared to sell it to the company, it was agreed (articles 1, 2, 3, and 4) that the concession should be effectually sold and transferred to the company, who should be free from any competition by the vendors; (articles 5 and 6) that in the event of either of the vendors acquiring any like concessions for any other place or places in China, they would not dispose thereof to any other party on any terms without first giving the company an ample opportunity of acquiring them upon the same terms; (article 7) that the company would within three months allot to Thomas Glen or his nominees 400 shares of 10*l*. each of the company's capital (not exceeding 20,000*l*.) and would provide 4000*l*. to be immediately applied in paying up the 400 shares in full.

Article 8 of the agreement was as follows:

"If and whenever the amount of the company's paid up capital shall be increased above the sum of 20,000*l*., the company will allot to the said Thomas Glen, his executors, administrators or assigns, such further number of shares as shall be equal to one-fifth part of the increased capital, so from time to time actually paid up beyond the said sum of 20,000*l*., and will pay to him, or them, or to the said Henry Parkinson Sharp and William Matthew Mills Whitehouse, as the nominees of him or them, a sum equal to the nominal amount of the shares so allotted to him or them, which sum or sums so paid shall from time to time be immediately applied in paying up in full the shares so allotted."

Articles 9 and 10 were merely ancillary to article 8.

Article 11 stipulated that the company were to provide such capital not exceeding 50,000*l*. and were to do such things as should be necessary to carry out the concession in accordance with its terms.

Article 12 provided for certain defeasances in events which did not happen.

Soon after the date of the agreement the concession was duly transferred to the company, a first issue of 2000 shares of 10*l*. was made, and 400 of these shares (less 177 shares by which the price was reduced by agreement under particular circumstances) were allotted to Thomas Glen or his nominees, and were credited as fully paid up in accordance with clause 7 of the agreement. Further issues of shares, up to 7000 in all, were made in 1862, 1863, and 1873, the capital of the company being increased for the purpose on the two last occasions. On all these issues the claim of Thomas Glen to receive one-fifth of the increased capital was duly recognized, though it was said that on at least one occasion he waived or compromised his right to a full fifth of the extra capital so as to enable the issue of the remainder to be effectually carried out. In view of, and to escape as far as possible, the onerous provisions of article 8 the company raised a quite unusual amount of the capital required for their undertaking in the form of debentures rather than as share capital. The operations of the company were successful, and it was common ground that at the present day their shares stood at a large premium. Their operations, however, were not extended to any other place or places in China, but were confined to the area covered by the concession originally transferred to them.

Thomas Glen died in 1900, and the present action was brought by the company against his executors for (1.) a declaration that the provisions contained in clauses 8, 9, and 10 of the articles of agreement were ultra vires the plaintiff company and invalid and void; and, alternatively, (2.) a declaration that, according to the true construction of the said articles of agreement, the provisions of clauses 8, 9, and 10 thereof ceased to operate after the issued capital of the company amounted to 50,000*l*; and, in the further alternative, that any further shares to be allotted, on any future increase of the company's capital, to the defendants or their nominees, in pursuance of the said articles of agreement, would, notwithstanding anything therein contained, be held by the nominees subject to the liability to pay the full nominal amount thereof in cash to the company, without any liability on the company to provide such cash or any part thereof.

The trial of the action took place before Sargant J. on February 12 and 14, 1914.

Younger, K.C., *Martelli, K.C.*, and *R. H. Hodge*, for the plaintiff company. There are three questions to be argued, namely, (1.) whether T. Glen was entitled to participate in any increase of capital beyond 50,000*l.*; (2.) whether an agreement for the sale of a concession to a company limited by shares in consideration of a fixed sum in fully-paid shares, and a fixed proportion, to be issued in fully-paid shares to the vendor, of any future increase of the company's capital, is ultra vires; and (3.) whether, if the shares in the increase of capital are issued to the vendor, he is liable to pay for them.

As regards question 1, it is contended that, having regard to article 11 of the agreement, the vendor was not, assuming the agreement was intra vires, entitled to any share in any increase of capital beyond the 50,000*l*. referred to in that article.

As regards question 2, the company, without proposing to disturb any issue of shares to T. Glen in the past, contends that the agreement is ultra vires. If this contention is held to be sound, it follows that, if shares in any further increase are issued to the defendants, those shares must be paid for, and this will answer the third question in the affirmative.

Although the authorities which will be relied on were decided on the Companies Act, 1862, and this company was incorporated under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), the language of the material sections of the two Acts, though not precisely the same, is to the same effect. Sect. 5 of the Act of 1856 says that "the memorandum of association shall contain the following things; (that is to say) . . . . 6. The number of shares into which such capital is to be divided, and the amount of each share." Sect. 8 of the Act of 1862 says that in the case of a company limited by shares "the memorandum of association shall contain the following things; (that is to say) . . . . (5.) The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." Sect. 3, sub-s. 1 (v.), of the Companies (Consolidation) Act, 1908, uses the words "the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount." All these provisions have the same meaning. Then s. 61 of the Act of 1856 says "In the event of any company being wound up by the Court or voluntarily, the existing shareholders shall be liable to contribute to the assets of the company to an amount sufficient" for the purposes specified "with this qualification, that if the company is limited no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him." This provision is, in effect, repeated in s. 38 of the Act of 1862, sub-s. 4 of which says that "in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." These words are repeated in s. 123, sub-s. 1 (iv.), of the Act of 1908.

The case of *In re Weymouth and Channel Islands Steam Packet Co.* (1) indicates that the scope of the Acts of 1862 and 1856 is the same as regards the liability of shareholders in a limited company. It cannot be contended that the Act of 1862 made ultra vires transactions which were intra vires under the Act of 1856.

[SARGANT J. I should require a great deal of argument to convince me that such alteration was made.]

The decisions on the Act of 1862 state what was also the law under the Act of 1856. The agreement must be read as it was originally made.

[*Gore-Browne, K.C.* The agreement must be read by the light afforded by the construction put on it by both parties for over fifty years: see *North Eastern Ry. Co.* v. *Lord Hastings.* (2)

SARGANT J. That is only when there are two possible interpretations.]

The agreement says nothing about allotting shares as fully paid up, the framers of it intelligently anticipating s. 25 of the Companies Act, 1867; but the effect is the same. In article 7 of the agreement the real consideration for the sale of the concession is shewn. That is to be 400 shares of 10*l.* each. These are to be allotted to the vendor, and contemporaneously 4000*l.* is to be placed by the company in the hands of a nominee of the company and a nominee of the vendor, who are immediately to apply the 4000*l.* in paying up in full the 400 shares. We are not complaining of that, but of the provisions of article 8, under which, on every increase of capital beyond a fixed amount, a fifth of the new shares are to be allotted to T. Glen, or his personal representatives or assigns, and the process of paying up these shares in full with money provided by the company is to be repeated. The net result of the two operations is that out of every issue of 20,000*l.* new capital the company gets only 16,000*l.*, while the vendor gets 4000*l.* in fully-paid shares without paying or giving any consideration for them.

It might be more difficult to argue that the transaction was bad if any addition to the concessions sold were to be the company's property as consideration for the vendor's slice of each issue of new capital, but under articles 5 and 6 any such additions are only to be first offered to the company at a price fixed by the vendor, who in case of non-acceptance by the company may sell to some one else. So that if there was an addition to the property sold, the vendor would get his full price for it plus his fully-paid shares in the increase of capital.

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(1) [1891] 1 Ch. 66.

(2) [1900] A. C. 260.

No reported case can be found which is exactly in point, but the principles applicable are laid down in *Ooregum Gold Mining Co. of India* v. *Roper* (1), a case as to issuing shares at a discount. There it is laid down that the system created by statute, by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares; and that ss. 8 (5.) and 38 (4.) of the Act of 1862, read together, shew the intention of the Legislature that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal amount. In the same case, whilst it is recognized that shares may be allotted for a consideration other than cash and that the value of such a consideration will not be too critically inquired into, it is pointed out that Courts will refuse to give effect to a colourable transaction entered into for the purpose or with the obvious result of issuing shares at a discount.

These principles are elaborated in *In re Wragg, Ld.* (2), in which the Court went a long way in holding that the transaction before it was unimpeachable on the ground of the inadequacy of the consideration given for the fully-paid shares, but was careful to observe that, where shares are issued without consideration, the holder must pay up the face value, whatever contracts may be made or filed, and that a transaction may also be impeached where the consideration is only colourable. Although there may be no inquiry as to the particular value of the consideration given for fully-paid shares, it is a condition precedent to the validity of the transaction that the parties should have arrived at the amount of it, and that the amount should be measured by the nominal amount of the paid up shares allotted: *Chapman's*

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(1) [1892] A. C. 125.

(2) [1897] 1 Ch. 796.

Case. (1) Even where a company is under a contingent liability as against profits, it cannot turn that into a capital liability and issue fully-paid shares as against it: *Bury* v. *Famatina Development Corporation.* (2) And in order to make a transaction ultra vires it is not necessary to shew that shares must, under it, be issued at a discount; it is sufficient to shew that it enables that to be the result: *Mosely* v. *Koffyfontein Mines.* (3) For some time after the decision in *In re Almada and Tirito Co.* (4), that shares could not legally be issued at a discount, it was thought that a vendor might take, in fully-paid shares, a part of increases of capital, as is shewn by a form in Palmer's Company Precedents, 5th ed. (1891) p. 116; but that form has not appeared in subsequent editions.

The defendants are not entitled to have shares on any further increase in capital on paying for them at par, for that would be making a new contract between the parties; they are not entitled to any new shares at all. [They also referred to *In re Eddystone Marine Insurance Co.* (5)]

Gore-Browne, K.C., and *W. Gordon Brown*, for the defendants. On the points involved in this case it is admitted that the sections of the Act of 1856 and the Act of 1862 are to the same effect. The shares in the increased capital are said to be either issued at a discount or for no consideration, but the key is not to be found in reference to such catchwords, but in the Act of Parliament, that is to say, in s. 5, sub-s. 6, and s. 61 of the Act of 1856. The amount of the share must be stated as required by the former provision, and under the latter the liability is restricted to "the amount, if any, unpaid on the share." But there is no prohibition against issuing the shares, and if they are issued, unless it is shewn that no consideration was given for them, or unless the contract has been set aside, the Court will not inquire into the adequacy of the consideration. The decision in *In re Wragg, Ld.* (6) is to the effect that the company, if acting honestly, can contract to buy property for any price it likes, and can pay that price in fully-

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(1) [1895] 1 Ch. 771.

(2) [1909] 1 Ch. 754; [1910] A. C. 439.

(3) [1904] 2 Ch. 108.

(4) (1888) 38 Ch. D. 415.

(5) [1893] 3 Ch. 9.

(6) [1897] 1 Ch. 796.

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paid shares. The valuation of the stock in that case was only about 15,000*l.*, while the portion of the consideration attributed to it on the sale was over 27,000*l.* But you must issue for meal or malt valued at the nominal amount of the fully-paid shares. In the present case the agreement was not for the payment for the property by fully-paid shares, but for cash, which was to be applied in paying up the shares in full. If the agreement had been for payment in cash and nothing more, the agreement would certainly have been valid, for the parties were acting honestly and were at arm's length, and the directors were independent, for the vendor was not a director. The future payments of cash might have been, as in substance they were, made on the contingency of the happening of any event, or certainly any event within the control of the directors. The directors were not bound to increase the share capital, and in fact at certain times they raised capital by the issue of debentures. The consideration for the sale might have been an annuity running over a number of years. There was nothing unreasonable in the agreement, and if it was unbusinesslike, that does not make it ultra vires. The vendor was saying, "I am giving you the seed from which you have to produce the fruit. It is true you have to cultivate that seed and bring it from the state of being unremunerative to the state of being fruit-bearing, but for having given you the whole thing I am to have a fifth of the whole of the capital and profits." The Court will not hold that a company cannot lawfully make a sum of money payable on a contingency which is not directly connected with the property handed over. It is not ultra vires for a company to enter into a contract to buy for a price varying in amount according to future contingencies, and these need not vary only with variations in the value of the property. A company, like a racehorse owner, may buy on the terms that the price shall be increased or reduced if a certain event happens or does not happen. The company here tells the vendor: "Your cash purchase shall be increased, but for our protection, as soon as you have got the increase in cash you shall invest it in our shares." The agreement was not only for the sale of a concession, for by article 4 the vendor, his executors and administrators, were prevented from competing with the company.

At the time when the agreement was made the concession was of unascertainable, and might be of enormous, value; and the fact that the consideration payable was not greater than the value of the concession is shewn by the present value of the shares and the prosperity of the company.

There is no statutory provision forbidding a man who receives money from a company to apply that money in paying up any shares he holds in that company; indeed before the money is paid to him, if it is actually due, he can set off against it any money due from him for calls: *Spargo's Case* (1); *Larocque* v. *Beauchemin.* (2)

The company could have paid the vendor the cash payable under the agreement without resorting to capital, and in *Bury* v. *Famatina Development Corporation* (3) there was no suggestion that the debentures could not be paid off out of profits.

The company is really asking the Court to make a new contract between the parties, but the agreement of 1862 must either be given effect to in full, or set aside altogether.

If the defendants are not entitled to have their one-fifth of every future increase of capital allotted in fully-paid shares, they are at any rate entitled to the allotment of the shares subject to the liability to pay for them in cash at par value. [They also referred to *Bloomenthal* v. *Ford* (4); *Arnot's Case* (5); *In re Innes & Co.* (6)]

Younger, K.C., in reply.

Cur. adv. vult.

Feb. 20. SARGANT J. In this action the plaintiffs contend, first, that clauses 8, 9, and 10 in an agreement dated as long ago as July 14, 1862, are, on their true construction, no longer applicable; and, secondly, that, if and so far as they are applicable, they are bad and unenforceable either in whole or in part. The second contention is the only one of any general legal interest, and in brief raises the question whether the company could, for a fixed present consideration, validly contract that an indefinite amount of future share capital should from time to time be issued upon the terms that all liability thereon for calls should be at once extinguished without any contemporaneous payment by the allottees. The plaintiff company (hereinafter called the company) were incorporated under the Joint Stock Companies Acts, 1856, 1857, and 1858, in June, 1862, with a capital of 35,000*l.*, divided into 3500 shares of 10*l.* each. [His Lordship then stated the effect of the recitals in the articles of agreement of July 14, 1862, and of articles 1 to 7 and 11 and 12 thereof, as stated above, and read article 8 of the agreement, and stated the later facts set out above, and proceeded as follows:] I have mentioned all these facts by way of giving a short history of the matter, and also in view of certain suggestions that have been advanced on either side that some interpretation has been mutually put on the agreement or even some estoppel created. But no serious argument has been or could, in my judgment, be founded on the conduct of the parties subsequent to the agreement. It is clear that their continuing rights with regard to the subject-matter under discussion have not been modified, and remain the same as they were on the original completion of the transaction.

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(1) (1873) L. R. 8 Ch. 407.

(2) [1897] A. C. 358.

(3) [1909] 1 Ch. 754; [1910] A. C. 439.

(4) [1897] A. C. 156.

(5) (1887) 36 Ch. D. 702.

(6) [1903] 2 Ch. 254.

Thomas Glen died in the year 1900, and the company have now brought this action against his executors for the purpose of determining how far they are bound, as regards future issues of share capital, by the obligation of article 8 of the agreement. They do not propose to disturb in any way any issue to Thomas Glen that has been made in the past.

I will deal first with the question of construction. It has been argued, on behalf of the company, that there are various indications in the agreement that the parties were really only contracting with reference to the capital of the company as originally authorized, or at most with reference to the capital of 50,000*l.* mentioned in article 11 of the agreement. And it may be that, if the terms of article 8 were at all ambiguous or doubtful, these arguments might be of some force and even prevail. But, in my judgment, the terms of article 8 are clear and unambiguous, and apply to any increase whatever of the company's capital, whether beyond the originally authorized amount of 35,000*l.* or

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the larger amount of 50,000*l.* mentioned in article 11. And this being so, I am bound to give effect to these clear and unambiguous terms, and cannot resort to any other part of the document. This construction renders it necessary to deal with the general question of law above mentioned.

Now here I should premise that, though the incorporation of the company took place under the Act of 1856 and its amending Acts, and the language of the material provisions of the Act of 1856 differs slightly from that of the corresponding provisions of the Act of 1862, no material distinction for the present purpose has been pointed out between the meaning and effect of the two sets of provisions. It was practically conceded on both sides that the case of *Ooregum Gold Mining Co. of India* v. *Roper* (1) and the other like decisions under the Act of 1862 apply equally to companies incorporated under the Act of 1856. And, indeed, the point is to some extent at least governed by authority: see *In re Weymouth and Channel Islands Steam Packet Co.* (2)

Next, the precise meaning and effect of the language of article 8 should be examined. This does not in terms provide that the shares should be issued at a discount or as fully paid up, and Mr. Gore-Browne uttered a warning against the use of catchwords in deciding this case. When, however, the clause is carefully examined, I cannot think that it tends less to contravene the statutory provisions as to the capital of companies than if it were a clause providing in terms for the issue of fully-paid shares. For, while the first part of the article contains an obligation to allot to Thomas Glen or his nominees one-fifth of all increased share capital, the second part of the article provides that, contemporaneously with such allotment, the company shall furnish cash equal to the full nominal value of the shares, and earmarks and dedicates that cash, so that it has immediately to return to the company's coffers for the purpose of paying up the very shares in full. It is impossible, in my view, to hold that the second part of article 8 does not amount to a contract for the contemporaneous absolution and discharge of the allottee from his prima facie statutory liability to provide the nominal value of his shares in money. But it is, of course, clear that a shareholder may

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(1) [1892] A. C. 125.

(2) [1891] 1 Ch. 66.

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effectually contract to discharge his liability on his shares by (inter alia) the transfer of property in lieu of the payment of cash, and that it is not essential that for this purpose the real value of the property transferred should be ascertained as being, or should be in fact, the full equivalent of the cash liability: *In re Wragg, Ld.* (1) And accordingly it is argued, and this is the real pinch of the case, that the transfer of the concession, though made once and for all in 1862, was a sufficient equivalent in kind, not only for the discharge of the liability on the first 400 shares to be issued to the concessionaire, but also for the discharge of the liability on a fifth of any increased capital that might at any future time be issued to the concessionaire by the company.

This argument, however, seems to me to go far beyond the decision in *In re Wragg, Ld.* (1), and, indeed, to be in conflict with the views expressed both in that case and in the numerous cases there cited and examined, particularly *In re Almada and Tirito Co.* (2) and the *Ooregum Case.* (3) These cases clearly shew that although a value put on purchased property by the contract, and not fixed dishonestly or colourably, would be accepted as conclusive for this purpose while the contract still stands, yet the contrary would be the case where the contract shews on its face that the property is not an equivalent for the amount of the capital which ✓ it is proposed to exempt from liability. For instance, if shares were contracted to be issued as paid up to the extent of 20,000*l.*, as against property which might be shewn outside the contract to be worth only 15,000*l.*, the arrangement would probably hold water as in *In re Wragg, Ld.* (1) itself, where the discrepancy was one between a total of 35,000*l.* and a total of 46,000*l.* But, if the agreement were that the property to be purchased should be valued, and that against this property shares should be issued as fully paid to an extent exceeding the amount of the valuation by one-third, the arrangement would, in my judgment, be bad as to this excess of one-third. It would to this extent be apparent on the face of the contract that the attempted discharge of a part of the liability was illusory.

Now, in the present case the liability to be discharged on

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(1) [1897] 1 Ch. 796.
(2) 38 Ch. D. 415, 423.
(3) [1892] A. C. 125.

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one-fifth of all future increases of capital obviously and necessarily has no connection with or relation to the value of the concession. The case is far stronger in this respect than if article 8 related only to share capital issued for the purpose of exploiting the concession in question. For it applies to the whole increased capital of the company, whatever the purpose for which it may be required. Indeed, the absurdity becomes specially obvious if the event is considered of a gas concession for any other place in China being transferred by the Glens to the company. In that case the company would, on the face of the agreement, have to pay the Glens the full value of the new concession, for the company are only to have the first refusal, and are not to be entitled to any better terms than any other purchaser. And yet after paying the full price they would still be bound, in respect of any share capital raised to complete the purchase, to issue a further 25 per cent. to the Glens, and pay up or credit as paid up the whole of this 25 per cent. in full.

It is true that an individual may contract to pay for property on any terms, and may find it convenient and choose to pay a price which shall be little or almost nothing in any ordinary event, but shall be increased tenfold or a hundredfold in certain improbable events altogether unconnected with any increase in the value of the property purchased. But I do not see how a limited company can speculate in this way consistently with the principles laid down in the cases to which I have referred. As I understand the legislation in question, as interpreted by the cases, the liability of a shareholder may be discharged either by the meal of cash or by the malt of property, services, or the like; but this discharge will not take place if it is apparent that the malt bears no relation to the meal, and cannot therefore be estimated as being an equivalent for it. Can it be held here that the definite quantity of malt represented once and for all by the transfer of the concession is to be taken as the equivalent for ever of the obligation to render at any future time or times a wholly indefinite and unlimited quantity of meal? It seems to me that this question must be answered in the negative, and, indeed, that such a clause as article 8 could hardly have been introduced into the agreement of 1862 had the law on the subject been as fully ascertained at that date as it has since been.

I may add that I altogether dissent from the general principle contended for by Mr. Gordon Brown that the agreement of 1862 must either be given effect to in full or set aside altogether. In numerous cases where a continuing clause in an agreement has been found to be bad after the main part of the agreement has been carried out, the offending clause is struck out without the rest of the agreement being affected. A familiar instance is a purchase agreement containing restrictions in restraint of trade which are ultimately held to be contrary to public policy, as going beyond the reasonable protection of the covenantee.

So far I have come to the conclusion that the provisions of article 8 for crediting as fully paid up the fifth of any future share capital issued to the representatives of Mr. Thomas Glen is unenforceable and void as being contrary to the requirements of the Act of 1856 as to capital. Does it follow that the whole of article 8 is bad? I think not. It appears to me, as I have already indicated, that the article divides itself into two portions, and no argument has been put before me to shew that there is any objection to the earlier portion, consisting in the obligation to allot to the concessionaire one-fifth of the share capital from time to time issued. (See *Hilder* v. *Dexter*. (1))

I propose, therefore, to declare that article 8 of the agreement in question is good so far as it creates an obligation to allot to Thomas Glen, his executors, administrators, or assigns, one-fifth of the increased capital from time to time of the company, but bad so far as it purports to relieve the allottee or allottees from liability to pay up all or any part of the nominal amount of such share capital.

The points involved are difficult points of law, and each party has partly succeeded and partly failed. In my judgment no order should be made as to costs.

Solicitors for plaintiff company: *Gush, Phillips, Walters & Williams.*

Solicitors for defendants: *Lyell & Betenson.*

F. E.

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(1) [1902] A. C. 474.

ASTBURY J.
1914
Jan. 21, 22, 23, 27.

In re PACAYA RUBBER AND PRODUCE COMPANY, LIMITED.

BURNS' APPLICATION.

[0026 of 1912.]

Company—Prospectus—Expert's Report—Bona fide Report—Statements expressly based thereon—Contract to take Shares—Basis of Contract—Material Inaccuracy in Report and Statements—Rescission.

Where a company issues a prospectus inviting applications for shares on the faith of bona fide statements of fact expressly based on the bona fide report of an expert, the accuracy of those statements is prima facie the basis of the contract.

If the company does not intend to contract on that basis, it must dissociate itself from the report in such clear and unambiguous terms as to warn intending applicants that it does not vouch for the accuracy of the report or any statement based thereon.

Otherwise, if the report proves to be inaccurate, any material inaccuracy in the company's statements, though based thereon, will be a ground for rescission.

In such a case, calculations of future profits based on the data of the report may amount to a material misrepresentation of fact.

Principles stated in *In re Reese River Silver Mining Co.* (1867) L. R. 2 Ch. 604; *In re British Burmah Lead Co.* (1887) 56 L. T. 815; *Karbery's Case* [1892] 3 Ch. 1; *Lynde* v. *Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch. 178; *Aaron's Reefs* v. *Twiss* [1896] A. C. 273; and *Mair* v. *Rio Grande Rubber Estates* [1913] A. C. 853, discussed and applied.

Bentley & Co. v. *Black* (1893) 9 Times L. R. 580, distinguished.

SUMMONS.

The above company was incorporated on February 25, 1910, with a capital of 175,000*l.* in 1*l.* shares. On March 24, 1910, it issued a prospectus offering 100,000 shares for public subscription, payable 1*s.* on application, 4*s.* on allotment, 10*s.* one month after allotment, and the balance as and when required. The prospectus contained the following initial statement at the top of the front page:—" Mr. von Hassel calculates there are now growing on the estates at least *200,000 matured rubber trees.*"

The body of the prospectus was as follows:—

" This company has been formed to acquire important rubber estates situated on the river Pacaya, a branch of the Ucayali river, in the department of Loreto, Peru. The estates are about

3 days journey by steamer from Iquitos, the principal port of Peru on the river Amazon, whence there are regular lines of steamers to Liverpool.

"The estates which are being acquired by the company as *freehold and free* from encumbrances, cover an area of upwards of *75,026 hectares* (about 187,000 acres). They are divided into 15 sections [naming them seriatim].

"In addition the company will acquire about *one million acres of rubber-bearing virgin forest land.*

"Mr. Jorge von Hassel, the official surveying expert for the department of Loreto, and who is also the expert to the Peru Para Rubber Company, of Toledo, U.S.A., reports that the estates extend along the banks of the river Pacaya for 250 kilometres or 157 miles, the whole of which is navigable by steam launches all the year round.

"The following extracts are taken from his report:—

"'In the rainy season the river overflows and floods all the region with the exception of a few places, fertilising the rubber region every year. (This assures one of the most essential factors in the healthy growth and productiveness of the rubber trees).'

"'There are convenient and frequent services with Iquitos, and in this way the transport of rubber, wood, provisions, etc., is very easy, and very cheap.'

"'The rubber trees are very close together in groups not very far apart—the work of collection being easy. The said trees are all matured and ready for tapping.'

"There are at the present time on the exploited portion, occupying about one fourth of the estates, 50,000 matured trees of the class known as Hevea Braziliensis, connected by paths. On this basis Mr. von Hassel calculates that the virgin land comprising the remaining portion of the estates, exclusive of the virgin forest land, will easily show three times the quantity already in work, that is to say 150,000 to 200,000 trees. He states that the rubber is the same as that known as fine Para rubber.

"The 50,000 Para rubber trees, already exploited, should according to Mr. von Hassel, *produce 2 kilos, more or less, or about 4½lbs. per tree per season. The estates should therefore give* *a minimum yield of from 200,000 to 250,000 lbs. per season from the trees already opened up and ready for tapping.*

"Mr. von Hassel anticipates that when the whole of the estates are exploited they will be capable of producing a quantity of 300,000 to 400,000 kilos, or about 750,000 to 1,000,000 lbs. per annum. (This is exclusive of the virgin forest.) He has no hesitation in saying that if the plantations of this property are carefully worked, they will result in an excellent return, and that with sufficient capital the estates will become a rubber property of the highest class.

"Cocoa, coffee, cotton, sugar cane, plantains, and all tropical products can be cultivated with advantage. There are plenty of cedar and other woods which find a ready sale in the town of Iquitos.

"Mr. von Hassel further reports that:—

"'The connection with the Ucayali facilitates the employment of the necessary number of workmen and the easy means of obtaining food supplies. Iquitos is only 3 to 3½ days journey distant. Almost the whole of the Ucayali is populated by an industrious and peaceful people.'

"'The climate of the district, which is only 5 degrees from the equator, is very healthy. The heat is not fierce and the nights are generally cool.'

"The above statements are based on Mr. von Hassel's report, a certified translation of which can be inspected by intending applicants.

"At Cartagena, an important section near the mouth of the river Pacaya, a village is established which is the centre of the rubber business. There is a principal dwelling-house, also warehouses, storehouses, workmen's dwellings, etc.

"At various suitable points along the river on the estates are stations with dwellings for the work-people, where the rubber is brought by the workers and collected by steam launches. At Florencia there are storehouses, residence, etc. All the above are included in the property.

"The Peruvian Minister of Agriculture reports, that in addition to the matured trees that exist, the land lends itself to the sowing and cultivation of the same.

"The cost of collection, freight and export duty should not exceed 1*s*. 6*d*. per lb., c.i.f. Liverpool.

"The present average price of fine Para rubber is about 10*s*. per lb., but the directors prefer to calculate the profits on the following conservative basis :—

On *200,000* lbs. of dry rubber at 4*s*. per lb. net profit, for the first year's working	*£40,000*
On *400,000* lbs. of dry rubber, at 3*s*. per lb. net profit, for the second year	*£60,000*
On *600,000* lbs. of dry rubber at 2*s*. 6*d*. per lb. net profit, for the third year	*£75,000*

"In a few years it should be possible to exploit and tap *200,000 trees*, producing annually, say, 1,000,000 lbs. of dry rubber, which, on the basis of 2*s*. 6*d*. per lb. profit, would show a profit of about *125,000l.* per annum.

"Mr. von Hassel also states that in order to open up the unexploited portion of the estates and convert the land into paths, special 'path-openers' may be employed at the rate of 8*l*. to 10*l*. for each path, which they prepare ready for exploitation with ease and rapidity. It will thus be seen that an expenditure of a further 15,000*l*. should be sufficient to open up 1500 fresh paths to exploit the undeveloped portion of the estates."

On March 30, 1910, the applicant applied for 1000 shares on the faith of this prospectus and paid 50*l*., and on April 2, 1910, he was allotted 800 shares.

On October 11, 1910, having discovered that the prospectus was a tissue of misrepresentations, he wrote to the company rescinding his contract and demanding repayment of the 50*l*. He then had a nervous breakdown and was unable to attend to business till June, 1911.

On July 28, 1911, the company sued him for calls under Order XIV., and on August 30, 1911, he obtained unconditional leave to defend. On September 27, 1911, he commenced a rescission action against the company. On December 15, 1911, he delivered his defence in the calls action and counterclaimed for rescission, and on December 28, 1911, he delivered his statement of claim in the rescission action.

On February 7, 1912, the company was wound up compulsorily on a contributory's petition presented on January 19, 1912. On November 30, 1912, the liquidator gave the applicant notice that he intended to include him in the list of contributories, and on December 23, 1912, notwithstanding the applicant's protests, he was so included.

On January 6, 1913, the applicant issued this summons for removal of his name.

It appeared that the report was made on December 15, 1906, for a former owner Matthias. He subsequently sold the property to Israel. On February 4, 1910, Goldseller as Israel's attorney agreed to sell the property to Wilkinson, who on February 22, 1910, agreed to sell it to the promoters Rubber Estates, Limited, who on February 23, 1910, agreed to sell it to a trustee for the company. On September 8, 1909, Goldseller cabled to Israel "Buyer insists immediate cable signed by Hassel confirming his report and present condition of estates." On September 17, 1909, Mr. von Hassel replied "Referring Pacaya, exact measurement 75,026 hectares only, rubber tree plantations virgin forest as report, condition estates good." The directors relied on this cablegram as bringing the report up to date and framed their prospectus accordingly without mentioning the date of the report.

There was no suggestion of mala fides on the part of any one concerned, but the evidence shewed that the report and the prospectus based thereon contained several material misstatements of fact and conveyed a wholly misleading picture of the property, so that if the company were responsible for the misstatements the applicant was clearly entitled to relief.

For instance the rubber estates were not important but were in a more or less derelict condition at the date of the prospectus. The Pacaya was not a branch of the Ucayali but of the Buenagua. The property was twenty-one miles from the junction of the Pacaya and the Buenagua, and another ninety-six miles from the junction of the Buenagua and the Ucayali which flowed into the Amazon. The Pacaya was not navigable all the year round, and there were not frequent services with Iquitos, but only some private launches. The number of trees ready for tapping was greatly overstated, and the yield per tree greatly overestimated.

The liquidator, however, contended that the whole prospectus was expressly based on the report with calculations of profits on the same basis, and that there was nothing in the prospectus to shew that the company in any way vouched the accuracy of the report, or made its truth the basis of the contract.

Martelli, K.C., and *R. J. Willis*, for the applicant. The statements in the prospectus were no doubt based on the report, but the whole tone of the prospectus shews that the company adopted the report as their own and put it forward as the basis of the contract. At all events they did not so clearly and unambiguously dissociate themselves from the report, or warn the public that they did not vouch for its accuracy, as to be in a position to deny that the accuracy of the report formed the basis of the contract. In these circumstances the applicant is entitled to rescission: Buckley on Companies, 9th ed. p. 90; *Karberg's Case* (1); *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (2); *Mair* v. *Rio Grande Rubber Estates.* (3) In the last case the report was made by a man who afterwards became a director, and the report was alleged to be fraudulent, but the observations of the Law Lords as to the duty of a company putting forward a report in their prospectus are equally applicable to a case of innocent misrepresentation.

Hon. Frank Russell, K.C., and *Whinney*, for the liquidator. The liquidator as representing creditors is in a stronger position than the company. The whole prospectus is expressly based on Mr. von Hassel's report. He is stated to be the official surveying expert for the department of Loreto and also expert to the Peru Para Rubber Company. He was not in any sense the agent of this company, and is not put forward as such in the prospectus. The company in effect said "We have obtained a certified translation of Mr. von Hassel's report, and from his official position we believe his statements are true." That does not make them responsible for the statements of an independent expert who was not their agent: Palmer's Company Precedents, 11th ed. pt. i. p. 195; *In re Reese River Silver Mining Co.* (4); *In re British*

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(1) [1892] 3 Ch. 1, 11, 13.

(2) [1896] 1 Ch. 178, 183.

(3) [1913] A. C. 853, 861, 866, 868, 870.

(4) L. R. 2 Ch. 604, 611, 615.

Burmah Lead Co. (1) The only independent statements made by the company are arithmetical calculations of future profits, and these calculations are really based on the data of the report. Calculations of future profits are not statements of fact: *Bentley & Co.* v. *Black.* (2)

[ASTBURY J. In that case there was no allegation that the auditor's report was untrue and the Court held that the prospectus as a whole did not convey a meaning amounting to a misstatement of fact. But an estimate of future profits may amount to a representation as to existing facts: *Aaron's Reefs* v. *Twiss.* (3)]

That was a case of fraud and wilful suppression. There is nothing of the sort here. The observations in *Mair* v. *Rio Grande Rubber Estates* (4) must not be divorced from the facts, namely, (*a*) that the statements were fraudulent and (*b*) that they were made by a man who became a director and signed the prospectus. Apart from these facts the demurrer would have been allowed.

ASTBURY J., after stating the preliminary facts and holding that the applicant had not been guilty of laches, read the prospectus and pointed out that it contained first a series of extracts from Mr. von Hassel's report, and secondly a series of statements made by the directors which were based or said to be based upon that report as well as certain statements made by the directors on their own responsibility. His Lordship then referred to the fact that the report was made in 1906 and to the two cables of 1909, and continued: In a similar application by another applicant Roscoe, in the absence of any evidence that the contents of this report were other than accurate and true I did not think that the omission of the date alone availed the applicant, but it becomes a matter of more importance in the light of the further evidence adduced before me in the present case.

In the prospectus there seem to me to be at least three statements of fact made by the directors; first that the rubber estates in question are important, secondly that there are on the exploited portion of the estate 50,000 matured rubber trees connected by paths, and thirdly that 50,000 trees have been already exploited in the sense of being ready to work, though it is true that the directors say that those statements which they make and represent as facts are based, as indeed they were, upon Mr. von Hassel's report. [His Lordship then reviewed the evidence and continued:]

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(1) 56 L. T. 815.
(2) 9 Times L. R. 580.
(3) [1896] A. C. 273, 284.
(4) [1913] A. C. 853, 861, 866, 868, 870.

From this evidence I am satisfied that Mr. von Hassel's report contains serious misstatements of fact and that the general picture of a flourishing immediately payable rubber estate conveyed by it, especially when set out in a prospectus, is thoroughly misleading.

In the first place the property at the date of the prospectus was as to the portion which has been described as the exploited portion or the portion ready for immediate working in a more or less derelict condition, and even after the manager Taylor had been working on it for several months from October, 1910, to June, 1911, he could only vouch for 175 workable paths out of 206 described by him as formerly worked, which at the rate of 100 trees per path would equal 17,500 trees. The prospectus conveys that there are in the exploited portion, i.e., one quarter of the 187,000 acres, 50,000 matured trees connected by existing paths open and ready for immediate operations, whereas there was nothing of the sort.

Secondly the estimate that 50,000 trees said to be already exploited, opened up, and ready for tapping would yield 4½ lbs. of rubber per tree per year seems to me a gross exaggeration. The 200,000 lbs. of dry rubber which is set out as the estimated amount upon which the profit for the first year's working is calculated represents nearly twice or perhaps more than twice the average yield per tree in this district even if the trees and paths had been there ready to work. Although this is in itself merely an estimate of future profit, I think it amounts to a confirmation of an intended picture of an equipped and immediately workable property. As Lord Halsbury L.C. says in *Aaron's Reefs* v. *Twiss* (1), "if you are looking to the language as only the language

(1) [1896] A. C. 273, 284.

of hope, expectation, and confident belief, that is one thing; but . . . . you may use language in such a way as, although in the form of hope and expectation, it may become a representation as to existing facts." I think that the way in which these profits are calculated and the amount upon which they are calculated do convey a confirmation of the fact as to the 50,000 trees set out in the report.

There are other points bearing on the general representation of prosperity contained in this report and prospectus which I think help to complete the picture which on the whole I am satisfied is false and misleading; for instance that the Pacaya is navigable by steam launches all the year round and secondly that there are convenient and frequent services with Iquitos. On this point I may mention, although this is no doubt a mistake of the directors, and may have been perfectly innocently made, that Mr. von Hassel's report states, as the fact is, that there are frequent and convenient services between Iquitos and the Ucayali river. I think that is the meaning of his report. He says "The said river flows into the Ucayali where there are convenient and frequent services with Iquitos." But the prospectus, referring to the property and not to the Ucayali river, says "There are convenient and frequent services with Iquitos, and in this way the transport of rubber, wood, provisions, etc., is very easy." Then there is the question of the situation of the Pacaya itself. Standing alone, it would amount to very little, but in fact it is a misrepresentation. The Pacaya does not run into the Ucayali but into a branch or canal portion of it called the Buenagua, and this involves a considerable further distance to carry the goods. Then there are descriptions of the buildings and stations "at very suitable points along this river." I think they are given in an exaggerated form having regard to the evidence. Many of these matters taken alone might have been relatively unimportant, especially in a report made to the owner, who knew the property and the locality, but when set out in a prospectus such as this, with these statements as to trees, paths, and immediately realizable profits, they assume an importance which in my judgment cannot be and ought not to be disregarded. The date of the report itself, having regard to the more or less derelict condition of the exploited portion of the estate at the date of the prospectus, is a matter which also I think ought to have been disclosed to the applicants for shares.

In my judgment, therefore, this prospectus contains various misrepresentations and, as a whole, was calculated to convey an untrue and misleading impression as to the condition, value, and prospects of this company's property.

It was contended, however, on behalf of the liquidator that even if this be so the applicant is not entitled to succeed because it is submitted that the statements in question are not made in the prospectus by the directors or other agents of the company, but are contained in a report merely referred to in the prospectus, the truth and accuracy of which report is not vouched for or asserted on behalf of the company. This is an important matter and I will deal with the cases to which I have been referred.

In *In re Reese River Silver Mining Co.* (1), although the actual decision did not involve the point in question, I have been referred to two passages in the judgments of Turner L.J. and Lord Cairns L.J. in the Court of Appeal with regard to the effect of quotations from a report in a prospectus. Turner L.J. says (2): "Then it was said that the directors, when this representation was made, were as much deceived as the appellant himself, and that he ought not to be relieved, for that he must have understood the representation to have been made by the directors upon mere report."—As a matter of fact in that case the statement was made by the directors.—"But if a company will take upon itself to assume the authenticity of, and give credit to, the reports which are made to it, and represent as facts the matters stated in those reports, it must take the consequences. If the company had confined themselves to saying, 'We have received reports from which we believe, and have reason to believe, that these mines are in full operation, and are making daily large returns,' it might, and no doubt would, have been very difficult for Mr. Smith to be relieved from the contract, but the company, instead of thus referring to the information received, stated the circumstances as facts." Lord Cairns L.J.

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(1) L. R. 2 Ch. 604; affirmed (1869) L. R. 4 H. L. 64.

(2) L. R. 2 Ch. 611.

says (1) : "If they"—i.e., the directors—"had been content to say, 'We ourselves know nothing about the state of the mine, but we have been told it is a very valuable mine largely worked at present; ' and if they had, in point of fact, been so told, no person could have complained of the prospectus as calculated to mislead; but in place of repeating as hearsay what they had been told, they affirm it as a positive fact, and apparently, according to the terms of the prospectus, as a fact within their own knowledge."

In *Bentley & Co.* v. *Black* (2) Lord Esher M.R. in giving the judgment of the Court of Appeal on appeal from Kennedy J., who had found on the facts against the defendant in an action to recover calls, says: "It was said that the Court was not entitled to look at each paragraph separately and say that none of them taken alone contained any misstatement of fact, and on that ground merely hold that the prospectus was unobjectionable. The Court ought to consider whether the prospectus taken as a whole was not such that it conveyed a meaning which amounted to a misstatement of fact. How one was to get at such a meaning it was difficult to understand, but perhaps the proper way of looking at such a document was as suggested. In order to support such a defence as the present, however, it was necessary that the misstatement complained of should be a misstatement of a material fact. In this case the alleged misstatements were statements contained in a certificate which was set out in the prospectus."—It was the report of the auditor.—"That certificate asserted the existence of certain facts. It was necessary for the defendant to show that the directors in the prospectus asserted the existence of those facts. It was true that Mr. Lakeman was a chartered accountant, and that he had made a particular report, and that was all that directors said in the prospectus. The directors, being unable to go into an examination of the books themselves, employed a skilled accountant to do so for them. The true meaning of what they said in the prospectus was, We have employed a chartered accountant to go through the books and report to us the result of his examination, and he has made us a certain report. It was then said that the whole certificate was not set forth in the prospectus" and so on. Then, "At the utmost it came to this—that the directors calculated there would be certain profits. But anticipation of future results was not a statement of fact. There was, therefore, no misstatement of fact in this prospectus, and the defendant had no answer to the claim for calls."

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(1) L. R. 2 Ch. 615.

(2) 9 Times L. R. 580.

In *In re British Burmah Lead Co.* (1) Kay J. affirmed by way of judgment what Turner L.J. and Lord Cairns said in *In re Reese River Silver Mining Co.* (2) by way of dictum. I need not go through the whole of the facts of that case; but it was one in which the Court came to the conclusion that, having regard to the statements made in the prospectus, and a letter attached, and the provisions put in the form of application, and subsequent correspondence which took place between the company and the applicant, the applicant could not be taken to have supposed that the truth of the matters contained in what I may call the report in that case, referred to in the prospectus, was the basis or foundation of the contract at all.

With regard to *In re Reese River Silver Mining Co.* (2) and *In re British Burmah Lead Co.* (1), in my judgment the facts of the present case really do not fall within the exception therein referred to. Here the directors did not content themselves with saying in the prospectus "We know nothing about the state of this property, but have merely been told about it by Mr. von Hassel," but they, on behalf of the company, ask for subscriptions on the faith of their statements, give credit to the report, and, in my judgment, represent as facts, based no doubt upon it, most material allegations therein made.

With regard to *Bentley & Co.* v. *Black* (3), the shareholder in that case did not allege that the report and valuation in question there contained any untrue statement at all. The judge who tried the case held on the facts against him; and the Court of Appeal held that the prospectus, taken as a whole, did not convey a meaning amounting to a misstatement of fact, but rather a calculation by the directors as to future profits in connection with which they had employed an accountant to report to them.

(1) 56 L. T. 815.

(2) L. R. 2 Ch. 604, 611, 615.

(3) 9 Times L. R. 580.

In support of the opinion that I have formed in the present case, there are two or three authorities I propose to refer to.

In *Karberg's Case* (1), where the applicant had subscribed for shares on the faith of a prospectus issued before the incorporation of the company, and by certain promoters who had handed on his application to the directors, who allotted the shares applied for, Lindley L.J. put certain questions which had to be answered, one only of which is important here, namely (2), "Was the prospectus"—that is the preliminary prospectus, which had not been issued by the directors—"the basis of the contract formed by the application and allotment of shares?" Later on (3) the Lord Justice says this: "I pass now to the next point, viz., whether Mr. Karberg's application for shares can be treated as based on the prospectus, on the faith of which it was really made. The learned judge thought it could not; but in this I cannot agree with him. I can find no case exactly in point. Speaking generally, there is no doubt that a misrepresentation in order to vitiate a contract must be made by a party to it, or by his agent. But this rule is not without exception. *Stewart's Case* (4) and *Downes* v. *Ship* (5) warrant the proposition that an application to a company when formed for shares, based upon a prospectus issued by the promoters of the company before its formation, cannot be dissevered by the company from such prospectus. The offer to take shares is an offer to take them on the terms of the prospectus, and on no other terms; and the acceptance of the application by the allotment of the shares is the acceptance of the offer on those terms, and not on other terms. Applying this principle to the present case, it follows that the misrepresentation proved to have been made in the prospectus, although not made by the company or by its agents, vitiated the only contract into which Karberg and the company entered, and entitled Karberg to repudiate it, provided it was material to the contract and the repudiation was made in time. The company, not having made the representation by itself or by its agents, is not liable in damages; but as

(1) [1892] 3 Ch. 1.
(2) [1892] 3 Ch. 11.
(3) [1892] 3 Ch. 12.
(4) (1866) L. R. 1 Ch. 574.
(5) (1868) L. R. 3 H. L. 343.

regards rescission of contract, the company is in the same position as if it had made the representation itself without knowing it to be untrue."

In the present case I do not think that the company can be heard to say that the offer by Burns to take shares, and its acceptance of such offer, was not made upon the terms that the statement of fact contained in Mr. von Hassel's report, set out in the prospectus for the purpose of inducing such offer, was substantially true.

In *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (1) Romer J. set out out certain heads under which relief could be obtained in this respect, and the fourth, with the suggested alteration in Buckley on Companies, 9th ed. p. 90, is as follows: "Where the contract is made to the knowledge of the company or its agents on the basis of certain representations and it turns out that some of them were material and untrue," then the relief can be obtained.

In *Mair* v. *Rio Grande Rubber Estates* (2), although the decision turns substantially upon the fact that the author of the report in that case, which was referred to in the prospectus, had become a director prior to the issue of the prospectus, there are certain passages, I think, of general import in the judgment, which bear very closely upon the present case. The facts, shortly, were that a report had been obtained from a man of the name of Littler prior to his being a director. He subsequently became a director of the company; and his report was referred to in the prospectus very much in the same way as Mr. von Hassel's report is referred to here. Viscount Haldane L.C. says (3): "They quoted Mr. Littler's report in the prospectus as one made to them before incorporation, and presumably before he became a director. I will assume that they thus made it clear that the statements of Mr. Littler were his statements and not theirs. But none the less they put forward these statements, subject only to the qualification I have mentioned, in order to induce the appellant to subscribe. My Lords, if the statements be falsely and fraudulently made, I do not think

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(1) [1896] 1 Ch. 178, 182.
(2) [1913] A. C. 853.
(3) [1913] A. C. 861.

ASTBURY J.

1914

PACAYA RUBBER AND PRODUCE COMPANY, LIMITED, *In re.* BURNS' APPLICATION.

that they can keep the money subscribed, on the assumption which the appellant must be taken to have made, and which he was entitled to make, that Mr. Littler was reporting honestly." I should say further in this case that it was heard on demurrer, and fraud was alleged; and so, in that respect, it differs from the present case. Lord Shaw says (1): "The representation of a future yield may be put on one side; but it is manifest from the statements quoted as to Mr. Littler's report being the basis of the prospectus, that the directors treated it as true, and founded upon its truth as the basis of attractive recommendations to the public." Later on the same learned Lord says (2): "I do not deny that it would be possible for directors to apprise the public frankly in a prospectus that they dissociate themselves from one of their own number, and that with regard to him no warranty was given of the truth of what he represented or reported. This would make a peculiar document; but it might be done. Yet the doing of such a thing would require to be in the most clear and unambiguous terms, so as to constitute a specific warning to investors against doing that which otherwise anything under the hand of a director as such would warrant them in doing, namely, relying upon its accuracy and complete good faith. When such a prospectus comes, if ever, to be framed, Courts of law will no doubt scrutinize it. In the present case, my Lords, there was no such dissociation, either of the company or of the general body of directors, from the representations made by Mr. Littler. On the contrary, the directors expressly based the prospectus upon his report, and they and the company stood pledged to the position that they held it out to be true." Again (3) he says: "In an action, in short, for rescission of a contract to take shares, on the ground of misrepresentation in the prospectus, it is not necessary to prove a knowledge by the directors or signatories of that document of its untruth. This is in entire accord with a whole body of case law on the subject in recent times, and is substantially the language of Lord Lindley in *Karberg's Case.* (4) Then, my Lords, there is this further to be remembered. Fraud is not far away from—nay, indeed, it must be

(1) [1913] A. C. 866.

(2) [1913] A. C. 868.

(3) [1913] A. C. 870.

(4) [1892] 3 Ch. 13.

that it accompanies—a case of any defendant holding a plaintiff to a bargain which has been induced by representations which were untrue; for it is contrary to good faith and it partakes of fraud to hold a person to a contract induced by an untruth for which you yourself stand responsible. It is elementary that a party cannot take advantage of a benefit derived from a contract sprung out of his own fraud, and I think it is equally sound that a party cannot take a benefit from a contract sprung out of a falsehood which he has placed before the other party as an inducing cause." Lord Moulton says (1): "The contention on behalf of the defenders which has succeeded in the Courts below is that on the true construction of the prospectus the report of Mr. Littler is put forward, not as a statement by the company, but as a statement to the company, the accuracy of which is not vouched for by the company, but is, if I may use the phrase, one of the risks of the adventure in which the members of the public are asked to share. Now, I have no doubt that a prospectus may be couched in such terms that, when fairly construed, the public are warned that the company does not vouch for the accuracy of the reports quoted or referred to therein, and that this may be so even although the report may be made by a person in the employ of the company, or even by a director."

There is no such warning in the present case.

The result is that the liquidator's certificate settling the applicant's name on the list of contributories must be varied by removing it therefrom; and that the costs of this summons must be paid by the respondent out of the assets.

Solicitors: *Matthew J. Jarvis; Torr & Co.*

G. R. A.

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(1) [1913] A. C. 872.

ASTBURY J.

1914

Jan. 27.

In re BROOKES.

BROOKES *v.* TAYLOR.

[1913 B. 1492.]

Trustee—Mortgage Security—Interest duly paid—No Suspicion of Jeopardy—Mortgage properly retained—Distribution of Estate in Specie—No Valuation of Mortgage—Appropriation of Mortgage to Settled Share—Mortgage in Fact worthless at Date of Appropriation—Liability of Trustee—Judicial Trustees Act, 1896 (59 *&* 60 *Vict. c.* 35), *s.* 3.

While the interest on a trust mortgage was being regularly paid, and before anything had occurred to suggest that the security was in jeopardy and not properly retainable by the trustee, the trustee distributed the estate, and, without inspecting the mortgaged premises, which were ten miles off, or making any inquiry as to their actual value as a security, appropriated the mortgage at par to a settled share.

At the time of this appropriation the premises were in fact derelict, unoccupied, and in a dilapidated condition, and practically worthless as a security, though the mortgagor still continued to pay the interest regularly; and when about two years later the mortgage was called in the money was found to be irrecoverable:—

Held, that in the circumstances the appropriation was a breach of trust, and that the trustee was not entitled to relief under the Judicial Trustees Act, 1896, s. 3.

Rawsthorne v. *Rowley* [1909] 1 Ch. 409, n., distinguished.

WITNESS ACTION.

Under the will of Simeon Brookes, dated May 22, 1888, and in the events that happened his trustees Edward Pearson and Matthew Brookes were directed to retain one tenth share of the proceeds of sale of his residuary estate upon trust for Robert Brookes for life with remainder for such of his children as being sons should attain the age of twenty-one years or being daughters should attain that age or marry and to retain another tenth share on similar trusts for James Brookes and his children. The other shares were disposed of absolutely.

The testator died on December 28, 1892. The trustees Edward Pearson and Matthew Brookes retained 750*l.* to answer the settled shares amounting to 375*l.* apiece and distributed the rest of the estate.

On July 4, 1893, they lent 400*l.* to Henry Billington on mortgage of freehold property at Chester, and on November 2, 1893, they lent 350*l.* to Henry Rowbotham on mortgage of freehold property at Stalybridge subject to a 5*l.* chief rent or rent-charge.

On May 27, 1894, Matthew Brookes died. Edward Pearson thereupon asked the defendant to become a trustee, assuring him that the mortgages were sound securities and that the Stalybridge property was worth 680*l.* In reliance on this assurance and without visiting the property or seeing any documentary evidence of any valuation the defendant accepted the office and was duly appointed on July 12, 1894, the mortgages being transferred on the next day.

On July 14, 1899, the 400*l.* mortgage was paid off and the money was lent to Robert Brookes on mortgage of freehold property at Northwich.

On December 7, 1899, Edward Pearson died, leaving the defendant sole trustee.

On July 24, 1906, Robert Brookes died intestate, leaving a widow and four adult children. The children, who were entitled to their father's share of 375*l.*, arranged with the widow that she should take a reconveyance of the 400*l.* mortgage as administratrix and pay the defendant the 25*l.* excess. The widow was then to settle the unincumbered property on herself for life with remainder to the children. This arrangement was assented to by the defendant, who reconveyed the 400*l.* mortgage to the administratrix on December 11, 1907, and received the 25*l.* The property was then settled by a deed of family arrangement of December 12, 1907, made between the widow and children.

The Stalybridge mortgage of 350*l.* and the 25*l.* were retained by the defendant to answer the settled share of James Brookes and his children, some of whom were infants. The property was insured for 800*l.*, and the interest, chief rent, and premiums were duly paid by the mortgagor up to November 2, 1909.

In December, 1909, the defendant, who lived at Irlams o' th' Height, ten miles from Stalybridge, was advised by his solicitor to inspect the Stalybridge premises, as owing to recent legislation property was much depreciated. The defendant, who had not seen the premises before, found them vacant and in a bad state of repair. He at once took steps to realize the security, but without any result, the security being practically worthless and the mortgagor having no assets.

On April 24, 1913, James Brookes and his children, one of whom was an infant at the date of the writ but had since become of age, commenced this action against the defendant, seeking to make him liable for his breach of trust in handing over practically the entire trust estate to the Robert Brookes family on December 11, 1907.

The evidence shewed that from August, 1907, onwards the Stalybridge premises were derelict, unoccupied, and in a dilapidated condition, and practically worthless as a security.

The defendant denied that any breach of trust had been committed, and relied on the Judicial Trustees Act, 1896, s. 3. He was willing to retire and appoint new trustees. During the argument it was agreed that if the plaintiffs succeeded they were to have judgment for 200*l.* in order to save the expense of an inquiry.

Fairfax Luxmoore, for the plaintiffs. I do not impeach the original Stalybridge mortgage, and I am willing to admit it was a sound security in 1894, when the defendant became trustee. Neither in view of the authorities do I complain of the defendant's passive retention of this mortgage as part of the trust estate up to December 11, 1907. But before taking active steps to divide the estate in specie and appropriate part of it to a settled share in which infants were interested, the defendant ought to have had some sort of report or valuation of the property, or at least to have inspected it. He would at once have found out that it was practically worthless as a security. The appropriation in the circumstances was a clear breach of trust, and the defendant did not act reasonably within the Judicial Trustees Act, 1896, s. 3.

Percy Wheeler, for the defendant. The propriety of the Stalybridge mortgage is not attacked and the defendant was not unreasonable in retaining it: *In re Chapman.* (1) This is really admitted. Again a trustee is not bound to make periodical

(1) [1896] 2 Ch. 763.

investigations as to a mortgage unless something occurs to suggest that the security is in jeopardy. He can only be hit for wilful default: *Rawsthorne* v. *Rowley* (1), decided in 1907.

In the present case the interest, chief rent, and insurance premiums were regularly paid until November 2, 1909, and nothing occurred to arouse the defendant's suspicions that anything was wrong. In these circumstances the defendant being justified in treating the Stalybridge mortgage as a sound security for the purpose of retention was also justified in treating it in the same way for the purpose of appropriation, and if any breach of trust was in fact committed he ought to be excused under the Judicial Trustees Act, 1896, s. 3: *In re Grindey*. (2)

Astbury J. (after stating the facts). The case really comes to this. A trustee holds trust property in trust for two families of beneficiaries. Without any inquiry as to the value of the securities, he chooses to make a distribution and in fact hands over the only valuable security, i.e., really the entire estate, to one family, retaining a security in fact worthless for the other family. Is he liable to the latter family? In my judgment his liability is free from doubt, and the question is really unarguable.

The defendant relied on *Rawsthorne* v. *Rowley* (1), where Cozens-Hardy M.R. said: "When you are dealing with an authorized investment, whether it is an investment authorized in the sense that the trustees may themselves make the investment or whether you are dealing with a specific investment transferred to the trustees and thereby becoming authorized, although not an investment which they themselves might have made, in either case I do not believe that there is any obligation or duty on the part of trustees to make periodical or further investigations as to either the title of the security or the solvency or the sufficiency of the mortgagor. I must not be taken, in saying that, for a moment to question that if there are circumstances which suggest to a reasonable man that the security is in jeopardy, the duty may not arise; but the liability of a trustee in dealing with an authorized security must really proceed on

(1) [1909] 1 Ch. 409, n.

(2) [1898] 2 Ch. 593.

ASTBURY J.

1914

BROOKES, *In re.* BROOKES *v.* TAYLOR.

the footing of wilful default and not upon not making inquiries when he ought to do so."

I do not and could not decide anything contrary to that judgment. The present defendant is not attacked for retaining the Stalybridge mortgage, but because he has chosen without any inquiry as to the value of the securities to hand over what was in fact the whole estate to one family, leaving the other family with a security of no value whatever. For this breach of trust he is clearly liable, and I do not think he has acted reasonably and ought fairly to be excused under the Judicial Trustees Act, 1896, s. 3. I therefore give judgment for the 200*l.* agreed as the measure of liability.

Solicitors: *Coode, Kingdon & Cotton, for W. Clarke Deakin, Northwich; Biddle, Thorne, Welsford & Sidgwick, for C. E. Newell, Northwich.*

N.B.—See also *In re Lepine* [1892] 1 Ch. 210, 218.

G. R. A.

WARRINGTON J.

1914

Feb. 6.

GREEN & SONS (NORTHAMPTON), LIMITED *v.* MORRIS.

[1913 G. M. 2325.]

Goodwill—Assignor—Deed of Assignment for Benefit of Creditors—Compulsory Alienation—Sale of Business and Goodwill by Trustee—Solicitation of Old Customers by Assignor.

The general principle affirmed by the House of Lords in *Trego* v. *Hunt* [1896] A. C. 7, that a vendor who sells the goodwill of his business and receives the purchase-money cannot afterwards destroy that which he has sold by soliciting his former customers, does not apply to the case of a sale of a debtor's business by the trustee of a deed of assignment executed by the debtor for the benefit of creditors. In such a case the alienation being involuntary as in the case of a bankruptcy the exception established in *Walker* v. *Mottram* (1881) 19 Ch. D. 355 applies, and the debtor is not precluded from soliciting the customers of his old firm.

MOTION.

The defendant Edgar Eli Morris formerly carried on in partnership with others under the style of Morris Brothers the business of boot and shoe manufacturers at Northampton.

In 1913 the firm, finding themselves in financial difficulties, called a meeting of their creditors which was held on July 31, 1913, when a statement of affairs prepared by their auditors was put before the creditors and a proposal for carrying on the business was made to them. The creditors, however, declined to accept the proposal and passed a resolution requiring Morris Brothers to execute a deed of assignment to a trustee for the benefit of the creditors and appointed a committee of inspection consisting of the principal creditors. The debtors had no option but to comply with this resolution, as otherwise proceedings in bankruptcy would have immediately been taken against them.

The deed of assignment was accordingly executed on August 15, 1913, and by it the debtors conveyed and assigned to a trustee all the real and personal estate of or to which the debtors or any of them were or was seised or entitled (except property of leasehold tenure and shares not fully paid up and wearing apparel) upon trust to call in and convert into money the personal estate and to sell the real estate and their business of boot and shoe manufacturers as a going concern, and out of the moneys to be realized to pay the costs, charges, and expenses of or incidental to the negotiation, preparation, approval, and execution of the deed and the realization and certain rates and taxes, and subject as aforesaid to distribute the residue among the creditors of the debtors rateably according to the law of bankruptcy, in like manner as if the debtors had been duly adjudicated bankrupts. And the debtors, and each of them, appointed the trustee to be their attorney, in their and each of their names or name, to execute any deed or document which the trustee might think necessary or expedient for carrying into effect the trusts and purposes of these presents. And in consideration of the conveyance and assignment the creditors subject as therein mentioned released and discharged the debtors and each of them from all debts due from them to the creditors.

On September 23, 1913, the defendant Morris entered into the employment of the defendant W. B. Stevens, who carried on business as a boot and shoe manufacturer at Northampton under the style of W. B. Stevens & Co.

On October 20, 1913, the trustee with the consent of the committee of inspection sold the goodwill, trade marks, lasts, patterns, and knives in connection with the business to the plaintiffs for 750*l.*, and he executed a formal assignment of the trade marks and goodwill to the plaintiffs.

The defendant Morris had at the instigation of the defendant Stevens solicited the customers of the late firm of Morris Brothers.

The present action was brought by the plaintiffs against the defendants Morris and Stevens for an injunction to restrain them from soliciting the custom of or orders for goods similar in character to those dealt in by Morris Brothers from customers of that firm.

The plaintiffs now moved for an interim injunction to restrain the defendant Morris from applying and the defendant Stevens from instigating, procuring, or assisting the defendant Morris to apply privately or by circular or letter or otherwise to any person who was at any time a customer of the late firm of Morris Brothers, asking or soliciting such person to deal with or become a customer of the defendants or either of them, or not to deal with the plaintiffs.

Clauson, K.C., and *J. M. Gover*, for the motion. As regards the defendant Morris the case falls within the general principle affirmed by the House of Lords in *Trego* v. *Hunt* (1) that a vendor who sells the goodwill of his business and receives the purchase-money cannot afterwards destroy that which he has sold by soliciting his former customers. If he does so he can be restrained by injunction.

As regards the defendant Stevens, by inducing the defendant Morris to commit a breach of his obligation to the plaintiffs the defendant Stevens is guilty of an actionable wrong: *Temperton* v. *Russell* (2); *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (3)

[They were stopped.]

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(1) [1896] A. C. 7.

(2) [1893] 1 Q. B. 715.

(3) [1908] 1 Ch. 335.

G. T. Simonds (*Gore-Browne, K.C.*, with him), for the defendants. If the defendant Morris is precluded from soliciting the customers of his old firm I admit I have a difficulty in contending that the defendant Stevens is entitled to solicit them. It is submitted that there is no obligation on the former owner of a business not to solicit where the goodwill is not sold by him but by his trustee under a deed of assignment for the benefit of creditors. A bankrupt although he files his own petition will not be restrained from soliciting: *Walker* v. *Mottram.* (1) In that case it was held that a bankrupt whose business had been sold by his trustee in liquidation could not be restrained from soliciting his former customers, and that it was immaterial whether he had or had not joined in the conveyance to the purchaser. That decision proceeded on the principle that a debtor ought not to be prevented after the liquidation of his affairs from gaining his livelihood. The same principle it is submitted applies in the case where a debtor has assigned all his property for the benefit of his creditors. There is no privity of contract between the assignor and the ultimate purchaser of the business. In such a case there is no implied contract by the assignor that he will not solicit the customers of his old business. No contractual relationship can in that case be inferred the benefit of which passes from the trustee to the ultimate purchaser. If such a contractual relationship is to be inferred I admit I cannot, after the decision in *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (2), argue that the defendant Stevens did not instigate a breach by the defendant Morris of that contractual relationship.

Clauson, K.C., in reply.

[WARRINGTON J. The simple question is whether *Walker* v. *Mottram* (1) applies to this case.]

The assignment in this case, although for the benefit of creditors, is a voluntary one and therefore differs from the case of a bankruptcy where the property vests by operation of law. The trustee in this case is in the position of an attorney of the debtor to sell the property. He makes no title to the property sold except through the debtor. It is suggested that whatever the obligations may be as between the debtor and the trustee they

(1) 19 Ch. D. 355.

(2) [1908] 1 Ch. 335.

cannot be passed on to the purchaser. The true view is that the trustee sells as the agent of the debtor subject to certain directions as to how the purchase-money is to be applied. This is not the case of a sale without the consent of the debtor. It is a purely voluntary act on the part of the debtor to place in the hands of the trustee a power to sell. In the case of bankruptcy the property is vested in the trustee by operation of law. Here the property vests in the trustee by the voluntary act of the debtor. It is submitted therefore that the decision in *Trego* v. *Hunt* (1) applies: *Jennings* v. *Jennings* (2); *In re David and Matthews.* (3)

WARRINGTON J. This is a motion for an injunction to restrain the defendant Morris from soliciting and the defendant Stevens from instigating him to solicit the customers of the former's late firm. The question is whether the defendant Morris is or is not in the same position as a vendor of a goodwill who has received the purchase-money, in which case, according to the principle affirmed by the House of Lords in *Trego* v. *Hunt* (1), he would be committing a breach of the obligation imposed on him by the receipt of the purchase-money, if he solicited the customers of his late firm.

The facts are very short. The defendant Morris was a member of a firm of Morris Brothers which until August of last year was carrying on the business of boot and shoe manufacturers. On August 15, 1913, the firm executed a deed of assignment of all their property to a trustee for the benefit of their creditors. The deed of assignment did not in terms include the goodwill of the business, but as it comprised the whole of the property of the assignors, except certain specific things, the goodwill must be taken to have been included in it. On October 20, 1913, the trustee sold the goodwill and other things connected with the business to the plaintiffs. The defendant has entered into the employment of the defendant W. B. Stevens and with his concurrence has solicited the customers of his late firm.

There is no question as to the general principle that if a man sells the goodwill of his business to a purchaser and receives the purchase-money he cannot afterwards destroy that which he has sold by soliciting his old customers. But that principle has never been extended to any case except that of a sale or of some contract equivalent to a sale; and in particular in the case of *Walker* v. *Mottram* (1) it was decided that the rule to which I have referred, and which was there referred to as the rule in *Labouchere* v. *Dawson* (2), did not apply to the case of a sale not by the man who was carrying on the business, but by his trustee in bankruptcy. It was further held in that case that it made no difference in principle whether the bankruptcy was brought about by the bankrupt filing his own petition or by the hostility of his creditors, and in the course of the argument, when the motion was before him, Sir George Jessel M.R. put the position of a bankrupt and a liquidating debtor under the Bankruptcy Act, 1869, on exactly the same footing for the purpose of the case before him. I think that the short answer to this part of the motion is that it is impossible to find any rational distinction between the case of a man who becomes a bankrupt on his own petition and has lost his property which has become vested in his trustee in bankruptcy and that of a man who brings about the same result by executing a deed of assignment of his property for the benefit of creditors. The liquidating debtor is a person who is compelled by circumstances to take certain steps in order that his property may be distributed among his creditors in exactly the same way as a bankrupt who presents a petition under the present Bankruptcy Act. I can see no rational distinction between *Walker* v. *Mottram* (1) and the present case. In one sense what the debtor does is voluntary, in another sense it is not voluntary at all, as he may have taken the steps he did take in order to avoid other proceedings being taken by the creditors. A man by divesting himself of his property under such circumstances as those in this case does not thereby constitute the relation of vendor and purchaser between himself and the ultimate purchaser of the property. The motion against the defendant Morris therefore fails.

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(1) [1896] A. C. 7.
(2) [1898] 1 Ch. 378, 382.
(3) [1899] 1 Ch. 378.

The notice of motion also asks that the defendant Stevens may be restrained from instigating the defendant Morris to solicit

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(1) 19 Ch. D. 355.

(2) (1872) L. R. 13 Eq. 322.

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the customers, but it is clear that Stevens cannot be restrained from instigating Morris to do that which it is not illegal for him to do. The motion against Stevens must also fail.

Solicitors: *Sharpe, Pritchard & Co., for Becke, Green & Stops, Northampton; Deacon & Co., for Browne & Wells, Northampton.*

W. I. C.

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CHANNEL COLLIERIES TRUST, LIMITED *v.* DOVER, ST. MARGARET'S AND MARTIN MILL LIGHT RAILWAY COMPANY.

[1913 C. 2951.]

Company—Light Railway Company—Meaning of "Share Capital"—Directors — Casual Vacancy — Power of Election by sole remaining Director— Appointment of Unqualified Persons—Irregularity in allotting Shares— Validation of Irregular Acts—Companies Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 16), *ss.* 14—17, 81, 85, 89, 90, 92, 99.

A light railway company was incorporated by an Order, confirmed by the Board of Trade, under the Light Railways Act, 1896. This Order incorporated the provisions of the Companies Clauses Consolidation Act, 1845, and provided that the quorum for a general meeting should be five shareholders holding together not less than one twentieth "of the share capital of the company"; that the number of directors should be five but that the company might vary the number if it was not less than three or more than seven; that the qualification of a director should be not less than 250*l.* in the share capital; that the quorum at a directors' meeting should be three, but that if the number was reduced to three the quorum should be two; that P., J., and C. and two other persons nominated by them should be the first directors, and should continue in office until the first ordinary meeting, when the shareholders might continue in office the five directors or any of them, or elect a new board; and that the capital of the company should be 60,000*l.* in 6000 shares of 10*l.* each. P., J., and C. never nominated any other directors, but allotted to each of themselves his qualifying shares, namely, twenty-five shares, and also one share each to four other persons. At the first ordinary meeting (at which only P., J., and C. and two of the four other persons were present) a resolution was passed reducing the number of directors to three and continuing P., J., and C. in office. On a later day P. and C. ceased to be directors, but before doing so each of them executed a transfer of his twenty-five shares to a colliery company; the transfers were passed at a board meeting and the colliery company was registered as the holder of the fifty shares.

Subsequently J. purported to appoint X. and Y. directors of the railway company. X. then held only one share in the railway company and Y. held no share therein, but later on at the same meeting J., X., and Y. (acting bona fide and in the belief that the appointment of directors subject to their at once acquiring their qualification shares was good) purported to allot twenty-four shares to X. and twenty-five shares to Y. Shortly afterwards the colliery company transferred its fifty shares to S. and B.:—

Held (in an action by the colliery company and S. and B. against the railway company, J., X., and Y.), (1.) that one twentieth of "the share capital" meant one twentieth of the issued share capital, and therefore that the resolution of the ordinary meeting was valid; (2.) that, although the power to elect directors in the case of casual vacancies was, by s. 89 of the Act of 1845, given to "the remaining directors," it was unnecessary, in order that the power should be exercised, that there should be in office the number of directors prescribed by the Order, and, therefore, that J. had the power to elect new directors; (3.) that by s. 85 of the Act of 1845, the holding of the required qualification shares was a condition precedent to the election of a director, and, therefore, that X. and Y. had not been duly appointed and could not act as directors; (4.) that the irregular allotment of the shares to X. and Y. was validated by s. 99 of the Act of 1845; (5.) that S. and B. were entitled to have the register of shareholders rectified by inserting their names as holders of the shares transferred to them; and (6.) that J. must be ordered to convene a general meeting at an early convenient date.

By s. 11 of the Light Railways Act, 1896 (59 & 60 Vict. c. 48), an Order under the Act may contain provisions for the purpose (amongst others) of "the constitution as a body corporate of a company for the purpose of carrying out the objects of the Order"; and by s. 10 an Order confirmed by the Board of Trade is to have effect as if enacted by Parliament.

The Dover, St. Margaret's and Martin Mill Light Railway Company was incorporated by the Dover, St. Margaret's and Martin Mill Light Railways Order, 1909, which came into operation by confirmation of the Board of Trade on August 9, 1909. The Order contained the following provisions:—Sect. 3 incorporated the Companies Clauses Act, 1845. Sect. 4 incorporated into a company Sir Weetman Dickinson Pearson (afterwards created Lord Cowdray), Sir John Jackson, and Sir William Henry Crundall, and all other persons who had already subscribed to or should thereafter become proprietors in the undertaking, their executors, administrators, successors, and assigns, for the purposes therein mentioned by the name above stated. By s. 5 the first ordinary meeting of the company was to be held within six months after the commencement of the Order, and the subsequent ordinary meetings were to be held once or more often in every year as the directors might appoint. By s. 6 the quorum for a general meeting, whether ordinary or extraordinary, was to be five shareholders, present in person or by proxy, holding together not less than one twentieth "of the share capital of the company." By s. 7 the number of the directors was to be five, but the company might vary the number provided that it was not less than three nor more than seven. By s. 8 the qualification of a director was to be "the possession in his own right of not less than 250*l.* in the share capital of the company." By s. 9 the quorum of a meeting of the directors was to be three, but if the number was reduced to three the quorum was to be two. Sect. 10 was as follows: "Sir Weetman Dickinson Pearson and Sir John Jackson and Sir William Henry Crundall, and two other persons to be nominated by them and consenting to act, shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the commencement of this Order. At that meeting the shareholders, present either in person or by proxy, may either continue in office the directors appointed by this Order or nominated as aforesaid, or any of them, or may elect a new board of directors, or directors to supply the place of those not continued in office, the directors appointed by this Order or nominated as aforesaid being, if they continue qualified, eligible for re-election. At the first ordinary meeting to be held in every year after the first ordinary meeting the shareholders, present in person or by proxy, shall (subject to the power hereinbefore contained for varying the number of the directors) elect persons to supply the places of the directors then retiring from office, agreeably to the provisions of the Companies Clauses Consolidation Act, 1845, and the several persons elected at any such meeting, being neither removed nor disqualified nor having died or resigned, shall continue to be the directors until others are elected in their stead in manner provided by the same Act." By s. 79 the capital of the company was to be 60,000*l.* in 6000 shares of 10*l.* each.

On July 20, 1910, Sir W. D. Pearson, Sir J. Jackson, and Sir W. H. Crundall allotted to each of themselves twenty-five shares in the company, and to four other persons one share each.

The same three original directors never nominated any other directors under s. 10 of the Order, and at a general meeting held on July 20, 1910 (when there were present only the above-mentioned seven shareholders), the following resolution was passed:—"That the number of directors be reduced to three, and that the three following directors continue in office: The Right Honourable Lord Cowdray (referred to in the Order as Sir Weetman Dickinson Pearson), Sir John Jackson, M.P., Sir William Henry Crundall." The persons present at this general meeting were the three original directors and two out of the four other shareholders.

No resolution was passed at any general meeting appointing any other director.

Lord Cowdray and the other two original directors continued to act as directors until April 21, 1913, when Lord Cowdray and Sir W. H. Crundall ceased to be directors. On that day, but before they ceased to be directors, (*a*) each of the two executed a transfer of his twenty-five shares to the Channel Collieries Trust, Limited, (*b*) these transfers were passed at a board meeting, and (*c*) the transferee company was registered as the holder of the fifty shares.

On July 29, 1913, Sir J. Jackson purported to appoint John Proffitt and Arthur Jackson to be directors of the light railway company. Proffitt then held only one share in it, and A. Jackson did not hold a single share, but later on, at the same meeting, Sir John Jackson, Proffitt, and A. Jackson purported to allot twenty-four shares to Proffitt and twenty-five shares to A. Jackson. Sir John Jackson and Proffitt were in this matter acting bona fide and in the belief that an appointment of directors subject to their at once acquiring their qualification shares was good.

On August 26, 1913, the Channel Collieries Trust, Limited, executed transfers of twenty-five of its shares in the light railway company to Richard Tilden Smith and of its other twenty-five shares therein to Edward Otto Forster Brown. These transfers, although duly tendered for passing, had not, at the date of the motion below referred to, been passed by the light railway company, but were then lying at that company's office for the purpose.

In an action by the Channel Collieries Trust, and Smith and Brown (suing on behalf of all the shareholders in the light railway company except Sir John Jackson), against the light railway company, Sir John Jackson, Proffitt, and A. Jackson, the plaintiffs on November 19, 1913, moved, on notice, for an injunction to restrain Proffitt and A. Jackson from acting as directors or shareholders of the defendant company in respect of the twenty-four shares purported to have been allotted to the former and the twenty-five shares purported to have been allotted to A. Jackson; an order rectifying the register of shareholders (*a*) by removing the names of Proffitt and A. Jackson therefrom in respect of the said shares, and (*b*) by entering therein the names of Smith and Brown as persons entitled to twenty-five shares each; an injunction to restrain Sir J. Jackson, as the sole director, from purporting to act as a board of directors of the defendant company except for the purpose of filling up vacancies on the board; an order on Sir J. Jackson to fill up the vacancies on the board by appointing Smith and Brown (being the only duly qualified shareholders) as directors; and an order on Sir J. Jackson to convene a meeting of the shareholders of the defendant company to regularize its constitution and proceedings.

Romer, K.C., and *Roope Reeve*, for the plaintiffs. The resolution purporting to reduce the number of directors to three was invalid. The shareholders at the meeting held together only seventy-seven shares in the company, whereas s. 6 of the Order requires, to form a quorum, the presence of shareholders holding not less than one twentieth of the "share capital," which means the authorized share capital of 60,000*l*.

The so-called appointment by Sir John Jackson of Proffitt and Arthur Jackson was invalid on two grounds. The first of these is that, as the number of directors had fallen below the number prescribed by s. 7 of the Order, Sir John Jackson could not appoint directors. The provisions of the Order are imperative and not merely directory: *Bottomley's Case.* (1) Sect. 81 of the Companies Clauses Consolidation Act, 1845, says that "the number of directors shall be the prescribed number," that is to say, in this case, the number prescribed by the Order. By s. 89 of the same Act it is provided that if a director ceases to be a director by any other cause than that of going out of office by rotation the remaining directors may elect a duly qualified shareholder in his place; but it does not say that this power may be exercised where the directors are reduced to a smaller number than that required to form a quorum. The second ground of objection to the appointment of Proffitt and Arthur Jackson is that when Sir John Jackson purported to appoint them as directors they were not qualified to act. By s. 85 of the Act of 1845 "no person shall be capable of being a director unless he be a shareholder, nor unless he be possessed of the prescribed number, if any, of shares." Where, as in this case, a share qualification is required, the holding of the prescribed number of shares is a condition precedent to election as a director: *Hamley's Case* (2); *Jenner's Case.* (3) If, as we contend, Proffitt and Arthur Jackson were not duly appointed directors, the allotment of the shares to them, being by a board of directors only one of whom was qualified, was not a good allotment: *Bottomley's Case.* (1)

The defendants will rely on s. 99 of the Act of 1845, which provides that "all acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director." This provision is similar in effect to the latter part of s. 67 of the Companies Act, 1862 (reproduced in s. 74 of the Companies (Consolidation) Act, 1908), on which there have been many reported decisions. The present case is not within s. 99 of the

(1) (1880) 16 Ch. D. 681.
(2) (1877) 5 Ch. D. 705.
(3) (1877) 7 Ch. D. 132.

Act of 1845. It cannot be said that Proffitt or Arthur Jackson was "disqualified"; the fact is that neither of them ever was qualified prior to his so-called appointment. Moreover, this is no case of the defect being "afterwards discovered," for it was well known at the time to every one concerned, and persons having notice of a defect in the appointment or qualification of directors have been held not to be within the protection offered by s. 67 of the Companies Act, 1862: *In re Staffordshire Gas and Coke Co.* (1)

There is no answer to the claim of Smith and Brown to be placed on the register of shareholders. They have complied with the provisions of ss. 14 and 15 of the Act of 1845, with reference to transfers, and the Court has jurisdiction to rectify the register by inserting their names therein. [They also referred to the Companies Clauses Consolidation Act, 1845, ss. 9, 16, and to *Ex parte Kennedy* (2); *British Asbestos Co.* v. *Boyd* (3); *Dawson* v. *African Consolidated Land and Trading Co.* (4); *Howbeach Coal Co.* v. *Teague* (5); *Kirk* v. *Bell* (6); and Browne and Theobald on Railways, 4th ed. p. 60.]

Martelli, K.C., and *A. M. W. Wells*, for the defendants. The words "share capital of the company" in s. 6 of the Order refer to the issued share capital. The suggestion that the words refer to the authorized share capital cannot be entertained. The quorum under s. 6 of the Order is only five shareholders holding a twentieth of the share capital, and it cannot be supposed that unless they held 3000*l.* in shares there could be no meeting.

The number of directors having been validly reduced to three, on two of these ceasing to be directors otherwise than by rotation Sir John Jackson, the remaining director, could, under s. 89 of the Act of 1845, appoint other directors. It is true that the section says "the remaining directors" may elect, but by the interpretation clause (s. 3), unless the subject or context is repugnant, "words importing the plural number only shall include the singular number." If the defendants are right on this point, it does not matter that Proffitt and Arthur Jackson were not qualified when they were appointed, for Sir John Jackson will give an undertaking to reappoint them directors, and the claim for an injunction in this respect therefore fails. It is submitted, however, that it is sufficient if they were qualified simultaneously, that is to say, at the same meeting.

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(1) (1892) 66 L. T. 413.
(2) (1890) 44 Ch. D. 472.
(3) [1903] 2 Ch. 439.
(4) [1898] 1 Ch. 6.
(5) (1860) 5 H. & N. 151.
(6) (1851) 16 Q. B. 290.

But if there was any irregularity, the parties come within the protection afforded by s. 99 of the Act of 1845. That clause is exactly in the same terms as clause 71 of Table A of the Companies Act, 1862, and clause 94 of Table A of the Companies (Consolidation) Act, 1908. [They also referred to *In re Columbian Fireproofing Co.* (1)]

Roope Reeve in reply. Sect. 89 of the Act of 1845 was referred to in *Isle of Wight Ry. Co.* v. *Tahourdin* (2), where Cotton L.J. says: "Then it is said that there is no power in the meeting of shareholders to elect new directors, for that under the 89th section the power would be in the remaining directors. The remaining directors would no doubt have that power if there was a quorum left. But suppose the meeting were to remove so many directors that a quorum was not left, what then follows? . . . . I do not see how it is possible for a non-existent body to think proper to fill up vacancies." And he points out that a general meeting could elect a new board in such a case. [He also referred to *MacDougall* v. *Gardiner* (3), *In re Sly, Spink & Co.* (4), and Palmer's Company Precedents, 11th ed. pt. i. p. 728.]

Cur. adv. vult.

Dec. 3. SARGANT J. This is a motion for "an injunction to restrain the defendants John Proffitt and Arthur Jackson from acting as directors or shareholders of the defendant company in respect of twenty-four shares purported to have been allotted to the defendant John Proffitt and twenty-five shares allotted to the defendant Arthur Jackson. (2.) An order that the register of shareholders of the defendant company may be rectified (*a*) by removing the names of the defendants John Proffitt and Arthur

(1) [1910] 1 Ch. 758.

(2) (1883) 25 Ch. D. 320, 332.

(3) (1875) L. R. 10 Ch. 606.

(4) [1911] 2 Ch. 430.

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Jackson therefrom in respect of the said shares and (*b*) by entering the names of the plaintiffs Richard Tilden Smith and Edward Otto Forster Brown as persons entitled to twenty-five shares each in the defendant company. (3.) An injunction to restrain the defendant Sir John Jackson as the sole director of the defendant company from purporting to constitute or act as a board of directors of the defendant company except for the purpose of filling up vacancies in the said board and an order upon him to fill up the vacancies in the board of directors of the defendant company by appointing the plaintiffs Richard Tilden Smith and Edward Otto Forster Brown (being the only duly qualified shareholders) as directors of the defendant company. (4.) That the defendant Sir John Jackson may be ordered to convene a meeting of the shareholders of the defendant company for the purpose of regularizing its constitution and proceedings."

The facts are simple and are not really in dispute. But they raise several questions of law of some little difficulty. [His Lordship then stated the facts above set out and proceeded as follows :]

The first question that arises is whether the resolution of the general meeting of July 20, 1910, by which the number of directors was reduced to three, was a good resolution. This depends upon whether the phrase "one twentieth of the share capital of the company" in s. 6 of the Order means "one twentieth of the issued share capital" or "one twentieth of the authorized share capital of 60,000*l.*" In my judgment it has the former meaning. "Share capital" is an ambiguous phrase and may mean either issued capital or authorized capital according to the context. Here I think that the context points to issued share capital. For not only is the number of persons requisite to form a quorum an extremely small number, namely, five only, but in the case of a proportionate quorum it is far more rational to fix it with reference to the persons actually interested than with reference to a much larger class who may possibly become interested, and I can see no reason why it should be impossible to hold a general meeting unless such an amount of share capital has been issued as to render it reasonable to expect the shareholding of those present to amount to at least 3000*l.*

The next question is whether the appointment by Sir John Jackson, on July 29, 1913, of the defendants John Proffitt and Arthur Jackson as directors of the company was a good appointment. Two objections are made to this appointment, namely, (1.) that the prescribed number of the directors having fallen below three, Sir John Jackson had no power to make the appointment, and (2.) that the persons appointed had not any proper qualification.

The first objection depends on the Companies Clauses Consolidation Act, 1845, and particularly on ss. 81, 89, 90, and 92. Strictly speaking, it is not a question of quorum—that is a question of the proportion of the directors who have to be present in order to act effectively on behalf of the whole body—but a question whether there was a sufficient body of directors existing at the time to enable them to act in the appointment of new directors. Now here I think that the Act sufficiently shews that for this purpose it is not necessary to have the prescribed number of directors. For after s. 81 has provided that the number of directors shall be the prescribed number, s. 89 provides that, on such a casual vacancy as therein mentioned, the remaining directors may fill up the vacancy. The two sections taken together seem to me to indicate that for this purpose a number less than the prescribed number will be sufficient; for though in many cases the actual number of directors may exceed the prescribed minimum number, so that after a casual vacancy there would still be a prescribed number of directors left to fill the vacancy, yet there is nothing to confine the provisions of the Act to such cases. The provisions are quite general, and they seem to me directed to keeping up the prescribed number by providing that casual vacancies may be filled up by the remaining directors, whether less than the prescribed number or not. I need hardly add that having regard to s. 3 of the Act the term "remaining directors" includes a remaining director. And I notice, for what it is worth, that the plaintiffs themselves appear to take this view of the Act, since they ask the Court to direct Sir John Jackson to fill up the alleged existing vacancies on the board.

The second objection is more serious, and is, in my judgment, well founded. It seems clear from several cases that under s. 85 of the Companies Clauses Consolidation Act, 1845, the holding of the required qualification is a condition precedent to election as a director; and if so, an acquisition of the shares by an operation which, though nearly contemporaneous, is in fact slightly subsequent, and particularly by an operation which itself is carried out through the instrumentality of the appointment of the directors in question, will not do. Accordingly I have come to the conclusion that Mr. John Proffitt and Mr. Arthur Jackson have not been duly appointed and cannot at present act as directors. But as I am also of opinion, for the reasons already given, that Sir John Jackson could immediately reappoint those gentlemen as directors, and as he has by his counsel expressed his intention of doing so, if necessary, it would be nugatory to grant any injunction to restrain them from acting.

A third question is whether the allotment of twenty-four shares to Mr. Proffitt and of twenty-five shares to Mr. Arthur Jackson, though effected by a board of directors only one of whom was duly qualified, was a good allotment, and this again depends on the language of the Act of 1845, and particularly of s. 99, which provides as follows: "All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director." This is a validating section the terms of which are in themselves amply sufficient to cover the making of the allotment in question, and I can see no sufficient reason for not giving effect to it in the present case. It is not seriously disputed that the three persons who made the allotment bona fide thought that they were entitled to make it; and I have no reason to doubt that the allotment was made for the bona fide purpose of qualifying Mr. Proffitt and Mr. Arthur Jackson as directors. Incidentally it would appear that this allotment may have the secondary result of changing the control of the company by giving the majority of the shares of the company to Sir John Jackson, Mr. Proffitt, and Mr. Arthur Jackson instead of to the nominees of the Channel Collieries Trust, namely, the plaintiffs Richard Tilden Smith and Edward Otto Forster Brown, and if I thought that this had been aimed at by Sir John Jackson, Mr. Proffitt, and Mr. Arthur Jackson, that would, in my judgment, be evidence of want of bona fides sufficient to justify me in holding that they could not take advantage of s. 99 of the Act of 1845. But on the contrary I accept the direct testimony of Sir John Jackson and Mr. Proffitt that they were acting quite bona fide and that they considered that an appointment of directors subject to their at once acquiring their qualification was perfectly good; and on this view of the facts, the allotment of the shares in question must, in my judgment, be taken to have been made for the purpose of qualifying Mr. Proffitt and Mr. Arthur Jackson as directors.

In that state of things, I feel constrained to hold that s. 79 of the Act of 1845 applies and cures the defect in the allotment of the shares arising from the invalidity of the appointment of Mr. Proffitt and Mr. Arthur Jackson. The two cases of *Dawson* v. *African Consolidated Land and Trading Co.* (1) and *British Asbestos Co.* v. *Boyd* (2) shew that provisions of this kind are to be construed broadly as between companies and their members as well as between companies and outsiders. And I can see no sufficient warranty for holding that the directors themselves who have made a bona fide mistake are a separate class in this respect so as to be unable to take the benefit of such provisions, especially when, as here, each of them has as an allottee accepted a substantial pecuniary liability amounting to 250*l.* in all, which may, for anything I can tell, considerably outweigh any advantage to be derived from the possession of the shares in question. The case of *In re Staffordshire Gas and Coke Co.* (3), which has been pressed on me by the plaintiffs, was decided before the two cases to which I have just referred.

As regards the claim that the plaintiffs Richard Tilden Smith and Edward Otto Forster Brown should be registered in respect of twenty-five shares each, no suggestion has been made to me that they are persons to whose registration as shareholders of the company any objection could possibly be taken. It seems to me that under ss. 14 and 17 of the Act of 1845 each of these two plaintiffs has acquired an absolute unconditional right to be registered in respect of the twenty-five shares transferred to him by the Channel Collieries Trust, Limited.

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(1) [1898] 1 Ch. 6.
(2) [1903] 2 Ch. 439.
(3) 66 L. T. 413.

As regards the claim that Sir John Jackson should be ordered to summon a meeting of the shareholders, it appears that he is quite ready to do so if he can, but that he feels doubt whether, strictly speaking, he can do so. In this state of things, and as all parties appear to desire the summoning of a meeting, I think the Court is entitled to act on the suggestion thrown out in *MacDougall* v. *Gardiner* (1) and to direct Sir John Jackson to call a general meeting at some early convenient date.

I have now in accordance with the wish of the parties expressed my view on all the matters raised by the writ; and should the parties not be desirous of having a speedy appeal or of appealing at all, they can by consent treat the motion as the trial of the action and have a judgment drawn up which will dispose of all the questions in the action. But unless they notify their intention to adopt this course within ten days, there will merely be an order on the motion which will direct that the transfers of the twenty-five shares each to the plaintiffs Richard Tilden Smith and Edward Otto Forster Brown be duly registered. Ordinarily this is an order which would only be made at the hearing, but I gather that there is no objection on the part of the defendants to an order at the present time for the registration of these two transfers.

The costs of the motion will be costs in the action.

Solicitors for plaintiffs: *Birkbeck, Yeo & Co.*
Solicitors for defendants: *Batten, Proffitt & Scott.*

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(1) L. R. 10 Ch. 606.

F. E.

In re YOUNG.

YOUNG *v.* YOUNG.

[1912 Y. 680.]

SARGANT J.
1913
Dec. 18.

Will—Construction—Advances by Parent to Children—Release by Will—Residue bequeathed to Widow for Life and then to Children—Direction to bring Advances by Way of Loan into Account on Division.

A testator had made advances by way of loan to each of his sons on the understanding that they were to carry interest, but that the testator would not enforce payment, and that if unpaid the advances were ultimately to be brought into account in the division of the testator's estate. The testator never required any repayment, but parts of the sums were repaid spontaneously. By his will the testator gave his residuary estate to his wife, upon trust to receive the income and apply the same for her own use for life, and after her decease, he gave the residue to trustees, upon trust to divide the same among such of his children as should then be alive, the issue of any deceased child to take his or her parent's share. The will, as altered by two codicils, contained a proviso that if a son should at the death of testator's wife be an undischarged bankrupt, his share should be held in trust for his wife, and a direction that in making such division any advances made to any son during testator's lifetime which had not been repaid should be brought into account by him with interest at 2 per cent. from the date of the advance to the date of the testator's wife's death:—

Held, that the sons were not released from the obligations which they were under as debtors to repay the advances made by the testator, and that the testator's widow was entitled during her life to the interest on the amount of the advances.

Henry John Young by his will, dated March 24, 1891, bequeathed his household furniture and consumable stores absolutely. The will then proceeded as follows: "I devise and bequeath all my real estate of every tenure, and all other my personal estate and effects whatsoever and wheresoever, subject to and after payment out of my personal estate of my funeral and testamentary expenses, unto my wife, Louisa Ann Young, upon trust to allow my said real and personal estate to remain in its present state of investment, and to invest, in her absolute discretion, such part thereof as may consist of ready money, and to receive the rents and profits of my real estate, and to receive the interest and dividends arising from my invested personal estate, and to apply same for her own use for life. And after the decease of my said wife I devise and bequeath all my said real and personal estate unto my sons Henry James Young . . . . and Frank William Richard Young . . . . , or the survivor of them, hereinafter called my trustees, upon trust to divide my said real and personal estate equally among such of my nine children, videlicet Henry James Young, Alice Louisa Sanderson (widow), Frank William Richard Young, Emily Mary Moore (wife of Frank Moore), George Jolliffe Young, Walter John Young, Herbert Young, Edward Ernest Young, and Florence Amy Young, as shall then be alive, and the issue of any deceased child, such issue taking his, her, or their deceased parent's shares equally between them. And I direct that in making such division any advances that I have made to any of my sons during my lifetime, for the purpose of starting them in business, which have not been repaid, shall be brought into account by them." The testator thereby appointed his said wife sole executrix during her life, and after her death appointed his sons H. J. Young and F. W. R. Young, or the survivor of them, to be his executors.

By the first codicil, dated February 2, 1909, to his will, the testator appointed his sons H. J. Young, F. W. R. Young, G. J. Young, and W. J. Young to be executors and trustees of his will and codicil jointly with his said wife and devised and bequeathed to them his real and personal estate (except furniture and consumable stores) in trust for his wife for life and after her death as in the will mentioned, and with the powers, provisions, and conditions therein contained, except as varied by the codicil. The codicil then proceeded as follows: "Provided always, that if any one of my five sons"—naming them—"shall at the time of the death of my said wife be an undischarged bankrupt, then my trustees shall hold the share of any such son in trust to pay the same to the wife of the son so being an undischarged bankrupt as aforesaid . . . . And I declare that, in making the division of my real and personal estate among my children, any advances that I have made to any of my sons during my lifetime, for the purpose of starting them in business or for any other purpose whatsoever, and which shall not have been repaid, shall be brought into account, together with simple interest thereon at the rate of 5*l.* per centum per annum from the date of every such advance up to the day of the death of my said wife; and in all other respects I confirm my said will."

Three days after the date of the first codicil one of the sons was adjudicated a bankrupt, and the trustee in the bankruptcy sold all his estate and interest to the bankrupt's wife, Annie A. I. Young.

The second codicil, dated February 15, 1909, consisted of the following direction: "I direct my trustees, on taking into account the advances made to any of my sons, shall reckon interest thereon at the rate of two per cent. in lieu of five per cent., as mentioned in the above written codicil."

Testator died on March 27, 1909, and his will and codicils were proved by all the executors. All the nine children survived the testator.

Prior to the date of his will, and also between the date thereof and the dates of the codicils, the testator made advances by way of loan to each of his sons, the understanding being that they were to bear interest at 5*l.* per cent. per annum, but that the testator would not enforce payment. The testator never called on any son to pay any principal or interest, and all payments of principal or interest made by any son were made by him spontaneously.

H. J. Young and W. J. Young took out an originating summons against the other children (except the one who had been adjudicated a bankrupt), the wife of the bankrupt, and the testator's widow, for the determination of the questions (inter alia) whether the testator's will and codicils to any and what extent released the liability of the children advanced from such advances as were debts, and whether to any and what extent the interest payable or chargeable on the advances was payable to the testator's widow as life tenant. An inquiry had been ordered as to the advances, the result of which is referred to in his Lordship's judgment.

Wilfrid M. Hunt, for the plaintiffs, stated the facts and the questions involved.

J. E. Harman, for a son to whom advances had been made.

The directions in the will and codicils impliedly release the sons who have obtained advances from any obligation as debtors to repay advances made to them by the testator by way of loan. By the words "which have not been repaid" the testator means "which have not been repaid in my lifetime." It was not the intention that any part of the sums, or any interest thereon, should be paid during the lifetime of the widow. If the clauses as to the advances were not construed as suggested, they would have little or no effect.

Andrewes-Uthwatt, for another advanced son, contended to the same effect.

E. M. Winterbotham, for the testator's widow and one of his daughters. The sums advanced to the sons were debts due from them to the testator at the time of his death. There is not sufficient in the will and codicils to effect a release of those debts, and consequently they remain as debts, and the widow is entitled to receive the interest on them as part of her income as tenant for life. In *Limpus* v. *Arnold* (1) a similar point arose, but the decision turned entirely on the particular will in that case. The directions as to the advances are not ineffectual, for if one of the advanced sons were to die in his mother's lifetime leaving children, the directions as to bringing into account the amount with interest would alter what would otherwise have been the position of the grandchildren.

A. de W. Mulligan, for other daughters of the testator. The whole scheme of the will is consistent with the construction that the advances are to remain as debts, and this is confirmed by the direction in the first codicil. [He also referred to *In re Jaques* (2) as to the meaning of "advances."]

SARGANT J. The question I have to decide is whether the testator's will and codicils released the liability of certain of his children who were advanced by him for such advances as were debts, and if so to what extent.

Prior to the date of the will, and also between the date of the will and the dates of the codicils, the testator had made advances by way of loan to each of his sons, and the way in which this was

(1) (1884) 15 Q. B. D. 300.

(2) [1903] 1 Ch. 267.

done is shewn in an affidavit filed on the summons. Paragraph 3 of the affidavit says that "the document now produced and shewn to us, and marked H, contains list of the advances made by the testator to or for his said sons respectively, and of sums paid by them respectively to the testator, either in respect of such advances or by way of interest thereon." Paragraph 4 of the affidavit says that "except as hereinafter appears, no bills or promissory notes, or other written acknowledgments were given to the testator by the sons in respect of the advances made to them respectively, and there were no written documents recording the terms thereof. But in each case (except as hereinafter appears) the understanding was that they were loans, and were to carry interest at five per cent. per annum, but that the testator would not enforce payment, it being left to the sons respectively to pay interest and to repay principal only as and when they conveniently could do so, and that, if unpaid, the advances were ultimately to be brought into account in the division of the testator's estate. The testator never at any time called upon any of the sons to pay interest or to pay principal, and all payments of principal or interest to him which were made were made spontaneously by the son paying the same." I understand that the exceptions which are referred to in that paragraph really are not of any great consequence, and I need not say anything more with regard to them.

The testator, by his will, after providing that his wife was to have a life interest, and that on her death the estate was to be divided amongst such of his nine children as should then be alive, and the issue of any deceased child, such issue only taking his, her, or their parent's share, added this provision: "And I direct that in making such division any advances I have made to any of my sons during my lifetime for the purpose of starting them in business, which have not been repaid, shall be brought into account by them."

That will was made in 1891, and by a codicil made many years afterwards, on February 2, 1909, after altering the appointment of the trustees of his will, but directing that his estate should go in the same manner in which it was given by the will, the testator added this declaration: "And I declare that, in making the

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division of my real and personal estate among my children, any advances that I have made to any of my sons during my lifetime, for the purpose of starting them in business or for any other purpose whatsoever, and which shall not have been repaid, shall be brought into account, together with simple interest thereon at the rate of *5l.* per centum per annum from the date of every such advance up to the day of the death of my said wife; and in all other respects I confirm my said will."

Then in a second codicil, made shortly afterwards, on February 15, 1909, the testator said this: "I direct my trustees, on taking into account the advances made to any of my sons, shall reckon interest thereon at the rate of two per cent. in lieu of five per cent., as mentioned in the above written codicil."

It is argued, on behalf of the sons who have been advanced, that those directions as to advances constitute an implied release of the sons from the obligations which they were under, as debtors, to repay the advances which had been made to them by the testator by way of loan. It is possible that this may have been the intention of the testator, but, in order so to construe his will, I must come to the conclusion that he has expressed or sufficiently indicated that intention, and on the whole I think that he has not done so. It seems to me that the provisions with respect to these advances are affirmative and not negative provisions, for on their face they make arrangements for the recovery or the charging of these sums, and do not make arrangements for their discharge. Further, as a matter of construction, I think that great importance must be attached to the limited effect which is in terms given by the testator to the clauses with reference to the advances. For in his will he says that in "making such division" the advances are to be brought into account, and in the first codicil he uses the words "in making the division of my real and personal estate," so that, apparently, he is introducing these clauses as to the advances for the purpose of regulating the way in which the division is to be made at the death of his wife—not for a purpose which would have the effect of depriving his wife of the whole of the income on these debts during her lifetime.

Further, I think, as a matter of construction, that the words

" which have not been repaid " in the will, and the words " which shall not have been repaid " in the first codicil, extend quite as naturally to repayments which should be made during the lifetime of the wife as to repayments made during the lifetime of the testator himself, and that, therefore, he is apparently contemplating the existence of the relation of debtor and creditor between his trustees and the sons who were debtors, and the possibility of a repayment being made during the lifetime of the wife.

It was said on behalf of those interested in there being a discharge of the debts—and I think the argument mainly rested upon this—that the clauses with reference to the advances would, having regard to what the testator's position was with reference to his sons, really have little or no effect if I were not to read them as effecting a discharge. I am not quite sure of that. I think, as Mr. Winterbotham pointed out, that the direction might have some effect with regard to the position of the children of a deceased child of the testator. If it should happen that in the lifetime of the testator's widow one of the advanced children should die leaving children who took his share, the direction that the amount advanced should be brought into account with interest would alter what would otherwise have been the position of those children. And further the direction might make a difference as regards advances in the ordinary sense—I mean advances by way of advancement and not of loan—made to a child by the testator after the date of his will or codicil, because, apart from any such direction, these advances would only be brought into account, on the division of the estate, without interest, and not with interest as he directs.

Moreover, having regard to the date of the first codicil, which was three days before the bankruptcy of one of his sons—and the impending bankruptcy must of course have been known to the testator at that time—I think some special meaning may well be given to the provision in the first codicil which would have the effect of keeping these loans alive for the purpose of diminishing the share of the son who went bankrupt, or of the children of that son, although as loans they would have been wiped out by the bankruptcy.

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But my main reason for holding that these loans have not been discharged as loans by these provisions is that there does not seem to be a sufficiently expressed indication of intention to do so. It may very well be that, if the testator had been asked what he intended to do, he would have said: "Well, I do mean that these children shall be turned from the position of debtors into the position of persons whose shares are merely to be diminished to the extent of the benefits they have received from me." But I have to construe the will as it stands, and on doing so I can find no sufficient indication of such an intention.

I must, therefore, declare that the testator's will and codicils do not release the liability of the advanced children for such advances as were debts, and that, so far as interest accruing on those debts is in fact paid after the testator's death, that belongs to the widow as the tenant for life.

Solicitors for the plaintiffs and some of the defendants: *Syrett & Sons.*

Solicitors for the other defendants: *Spencer, Gibson & Son; Shoubridge & Becher.*

F. E.

In re SANDWELL PARK COLLIERY COMPANY, LIMITED.

ASTBURY J.

1914

Feb. 17.

[00423 of 1913.]

Company—Scheme of Arrangement—Reconstruction—Sale for Shares in New Company—Special Provision for Dissentient Members—Jurisdiction under Arrangement Section—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120.

If proper provision is made for dissentient members, a reconstruction of an existing company by winding up and sale of the entire assets for shares in a new company may be effected under s. 120 of the Companies (Consolidation) Act, 1908.

In re General Motor Cab Co. [1913] 1 Ch. 377 distinguished.

PETITION.

This was an unopposed petition to sanction a scheme of arrangement under s. 120 of the Companies (Consolidation) Act, 1908.

The company was incorporated in 1870 with a capital of 20,000*l.* divided into 200 shares of 100*l.* each.

The capital, which had been increased and altered from time to time under powers in the articles, now consisted of 250,000*l.* divided into 31,881 six per cent. cumulative preference shares of 1*l.* each, 61,869 ten per cent. cumulative preferred ordinary shares of 1*l.* each, and 15,625 ordinary shares of 10*l.* each. The preference and preferred ordinary shares had a priority as to their fixed dividends and capital, but no further right to participate in profits, or assets in a winding-up. The whole capital was issued and fully paid, or credited as fully paid. No dividend had been paid on the preference shares since 1909 or on the ordinary shares since 1906. No dividend had ever been paid on the preferred ordinary shares, which were only created in 1910.

Owing to a recent influx of water into the colliery it was necessary to raise 35,000*l.*, and it was considered that this could best be done by the following scheme of arrangement.

This scheme provided that the existing company should go into voluntary liquidation, and that a new company of the same name should be formed with a share capital of 220,000*l.* divided into

50,000 six per cent. cumulative preference shares of 1*l.* each, 90,000 ten per cent. cumulative preferred ordinary shares of 1*l.* each, and 16,000 ordinary shares of 5*l.* each, having the same respective rights as the similar classes of shares in the existing company.

The liquidator of the existing company was to enter into an agreement to transfer the undertaking and assets to the new company in consideration whereof the new company were to pay and discharge the debts and liabilities of the existing company and the costs of winding up and obtaining the sanction to the scheme, and the members of the existing company were to have the right to claim allotments of shares in the new company as follows, namely:—

(*a*) Each holder of preference shares in the existing company might claim either (*α*) one fully-paid preference share in the new company for every preference share held by him in the existing company or (*β*) three preference shares in the new company credited as paid to the extent of 15*s.* per share for every two preference shares held by him in the existing company.

(*b*) Each holder of preferred ordinary shares in the existing company might claim seven preferred ordinary shares in the new company credited as paid to the extent of 15*s.* per share for every five preferred ordinary shares held by him in the existing company.

(*c*) Each holder of ordinary shares of 10*l.* each in the existing company might claim one ordinary share of 5*l.* in the new company credited as paid to the extent of 4*l.* for every ordinary share of 10*l.* held by him in the existing company.

Claimants were to pay 1*s.* per share on application for partly-paid preference or preferred ordinary shares, and 5*s.* per share on application for ordinary shares.

The shares in the new company were to be claimed within one calendar month after notice from the liquidator, and any shares not claimed were to be sold. The purchase-money for unclaimed preference shares was to be divided rateably among the non-claiming preference shareholders. The purchase-money for unclaimed preferred ordinary shares was to be divided rateably among the non-claiming preferred ordinary shareholders. The purchase-money for unclaimed ordinary shares was to be divided rateably among the non-claiming ordinary shareholders.

The following special provisions were made as to dissentient shareholders, namely:—

"11. If any holder of shares in the existing company who has not voted in favour of this scheme shall, within seven days after this scheme shall have been submitted to a meeting of the class of shareholders to which he belongs, express his dissent herefrom by a notice in writing addressed to the existing company, and sent to or left at its registered office, such member shall be entitled to require the existing company either to abstain from carrying this scheme into effect, or to purchase or procure the purchase of his interest at a price to be determined by agreement or by arbitration, in pursuance of the Arbitration Act, 1889, and this scheme shall not be carried into effect unless provision is accordingly made for the purchase of the interests of such dissentient shareholders.

"12. Those shares in the new company which, but for their dissent, would have been claimable by those members of the existing company who dissent from this scheme in manner aforesaid, shall be sold by the liquidator on such terms as he shall think fit, and the net proceeds of such sale shall be applied in or towards payment of the amounts payable to such members for the purchase of their interests, and in so far as such proceeds shall be deficient, the new company shall make up the deficiency."

The directors of the existing company or the liquidator might assent to any modification of the scheme or to any condition that the Court thought fit to approve or impose.

If the Court's sanction was not obtained within three calendar months of the submission of the scheme to the shareholders, or if shareholders holding shares to the nominal amount of not less than 10,000*l.* dissented, the directors might abandon the scheme, which should thereupon cease to be of any force or effect.

On January 9, 1914, separate meetings of the preference, preferred ordinary, and ordinary shareholders were held in pursuance of an order of December 15, 1913, for the purpose of considering and if thought fit approving the scheme.

At the meeting of preference shareholders 97 out of 152 members were present in person or by proxy, and 91 members holding 21,438 shares voted in favour of the scheme. The other six members holding 1565 shares did not vote.

At the meeting of the preferred ordinary shareholders 109 out of 148 members were present in person or by proxy, and 92 members holding 45,868 shares voted in favour of the scheme, while 16 members holding 2743 shares voted against it and one member holding 1000 shares did not vote.

At the meeting of ordinary shareholders 197 out of 437 shareholders were present in person or by proxy, and 188 members holding 8561 shares voted in favour of the scheme, while two members holding 50 shares voted against it and seven members holding 405 shares did not vote.

Except as appears above no objection had been taken to the scheme.

The debts and liabilities of the company on November 30, 1913, amounted to 45,267*l.*, of which 7150*l.* was due to trade creditors and the balance of 38,117*l.* was due to the company's bankers and was secured by a deposit of the title deeds of the company's freehold and leasehold properties other than the lease of the colliery.

On February 10, 1914, the company presented this petition praying that the scheme might be sanctioned so as to be binding on the company and the several classes of shareholders.

On February 16, 1914, the bankers made an affidavit stating that the scheme would be for their benefit and for the benefit of the general body of creditors and that they accordingly supported the application.

Gore-Browne, K.C., and *D. G. Hemmant*, for the petitioners. The scheme is highly beneficial to every one concerned. There has been no meeting of creditors, but the bankers who are the largest creditors have assented to the scheme, and we will undertake to pay all non-assenting creditors before parting with the assets. We do not compel any member to take new shares, and the rights of dissentient members are expressly preserved by clauses 11 and 12. We have therefore avoided the faults of the scheme refused in *In re General Motor Cab Co.* (1)

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(1) [1913] 1 Ch. 377.

[ASTBURY J. The absence of any provision for dissentient shareholders was an important feature in that case, but are the judgments limited to that? Buckley L.J. says (1): "What is proposed to be done under this scheme is not a compromise or arrangement at all, it is a sale for shares and a division of the proceeds of sale . . . . Another section of the Act of Parliament"—i.e., s. 192—"authorizes a sale for shares with proper safeguards . . . . It is not a compromise or arrangement under s. 120, it is a sale for shares and nothing else and a division of the proceeds of sale without any provision for dissentient shareholders." Does he not mean that a sale of the entire assets for shares in a new company is beyond the scope of s. 120?]

He cannot mean that. A sale was allowed by the Court of Appeal in *In re Canning Jarrah Timber Co.* (*Western Australia*) (2), the rights of dissentient shareholders being properly protected.

[ASTBURY J. In *In re General Motor Cab Co.* (3) Cozens-Hardy M.R. says: "That was an entirely different case to this. It came before me as judge of first instance, and I desire to adhere to the part of my judgment which alone is material to the present case . . . . I then said (4) 'I am asked to sanction a scheme of arrangement by way of reconstruction of the company whereby its assets and liabilities are to be transferred to a new company.' I thought that was not within the meaning of the arrangement section, the section corresponding to s. 120 of the new Act. I still think so; and there is nothing in the decision of the Court of Appeal contrary to that." Later on he says that the scheme is simply a proposal, and nothing more, to compel the shareholders who are of different classes in this company to accept shares in a new company "when there has been no order for sale of any kind and when, as it seems to me, there is no arrangement with the company or its shareholders or compromise between the shareholders and the company within the meaning of the section."]

His Lordship's attention was not called to the distinction between s. 120, which authorizes arrangements between a company and its creditors or members, and the old arrangement section, Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2, which was confined to creditors. The latter section was extended to members by s. 24 of the Companies Act, 1900 (63 & 64 Vict. c. 48), and in *In re Tea Corporation* (1) the Court of Appeal, after full argument on the question of jurisdiction, sanctioned a scheme closely resembling the present scheme. That is a clear decision that a sale of the assets for shares is within the scope of the extended arrangement section now replaced by s. 120. It was unfortunately not cited in *In re General Motor Cab Co.* (2) The same view was taken by Buckley J. in *In re Standard Exploration Co.* (3). His judgment is set out in Palmer's Company Precedents, 11th ed. pt. ii. p. 993. This case also was not cited in *In re General Motor Cab Co.* (2)

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(1) [1913] 1 Ch. 384.

(2) [1900] 1 Ch. 708.

(3) [1913] 1 Ch. 382.

(4) [1900] 1 Ch. 713.

[ASTBURY J. You propose to alter the whole constitution of the company by a scheme of which the registrar will have no official notice.]

That can be done under s. 120: *In re Schweppes.* (4) We did not proceed under s. 192 as we wished to distribute the purchase consideration according to the scheme. Under s. 192 the distribution must be in strict accordance with the members' rights, and it is possible that the preference shareholders whom we are giving share for share might have claimed more.

ASTBURY J. The question has been so fully discussed that I do not think I need reserve judgment. Having regard to the state of the authorities I feel considerable difficulty in the matter, but I am unable to distinguish the material facts in the present case from those in *In re Canning Jarrah Timber Co. (Western Australia)* (5), *In re Tea Corporation* (1), and *In re Standard Exploration Co.* (3), and I think the judgments in *In re General Motor Cab Co.* (2) must be read with reference to the particular scheme there which compelled shareholders to accept shares in the new company without giving them the rights of dissentients. I therefore sanction the scheme on the undertaking of the company not to part with the assets until the creditors have either been paid in full or assented to the scheme and accepted the new company as their debtor.

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(1) [1904] 1 Ch. 12.

(2) [1913] 1 Ch. 377.

(3) (1902) *The Times*, March 21, p. 13 c; March 26, p. 3 b.

(4) Ante, p. 322.

(5) [1900] 1 Ch. 708.

Solicitors: *Timbrell & Deighton, for Shakespeare & Vernon, Birmingham.*

G. R. A.

EVE J.
1914
Feb. 26.

In re PARK'S SETTLEMENT.

FORAN *v.* BRUCE.

[1913 P. 2190.]

Settlement—Real Property—Limitation to Widow of Bachelor for Life with Remainder to Issue—Definition of Rule restraining Limitations to Unborn Issue.

Limitation of freehold to issue of bachelor in remainder after life estate to widow:—

Held, void, as infringing "the rule against limiting land to an unborn child for life with remainder to his unborn child."

Whitting v. *Whitting* (1908) 53 Sol. J. 100, and dictum of Kay J. in *In re Frost* (1889) 43 Ch. D. 246, followed.

The rule should be expressed as above, and not as "the rule against double possibilities," following Farwell L.J. in *In re Nash* [1910] 1 Ch. 1, 9, 10.

ADJOURNED SUMMONS.

By a deed poll of May 30 1888 Laure Park as beneficial owner purported to convey to A. Bonnevialle R. W. Allen and J. A'Deane a freehold messuage No. 35 Milk Street with the appurtenances To hold the same unto the said A. Bonnevialle R. W. Allen and John A'Deane their heirs and assigns To the use of John Foran for the joint lives of the said Laure Park and the said John Foran And in case of the death of the said John Foran in the lifetime of the said Laure Park leaving a widow him surviving then To the use of such widow for her life And after her decease in case the said John Foran should have left lawful issue him surviving then To the use of such issue or such of them as should live to attain the age of twenty-one years and if more than one in equal shares And in the event of the said Laure Park surviving the said John Foran then immediately on

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PARK'S SETTLEMENT, *In re.*
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the death of the said John Foran or the death of any widow of the said John Foran and on failure of such issue then To the use of the said Laure Park if living in fee simple or if dead then to the use of her own right heirs absolutely.

John Foran was a bachelor at the date of the deed.

He married Alice Mary Migeon on or about October 28, 1891.

There was one child only of the marriage, Alice Mary Laura Foran.

John Foran died on or about October 11, 1894, leaving his wife and daughter him surviving.

The widow died on or about March 22, 1898, leaving the daughter her surviving.

The settlor died on or about March 27, 1910.

The question was raised (inter alia) whether the limitation to the issue of John Foran after the death of his widow was not void altogether, as infringing the rule against double possibilities or "limiting land to an unborn child for life with remainder to his unborn child," on the ground that John Foran was a bachelor at the date of the deed, and any wife whom he might marry might be some person who was not born at the date of the deed, and the limitations were therefore to a possibly unborn person for life with a remainder to John Foran's issue, who might be children of that unborn person.

Maugham, K.C., and *W. M. Cann*, *Fairfax Luxmoore* and *A. B. Marten*, for the parties respectively.

[*In re Frost* (1); *Whitting* v. *Whitting* (2); *In re Nash* (3); and *Whitby* v. *Mitchell* (4) were cited.]

EVE J. (after saying he should have been prepared to hold, on the construction of the deed, that John Foran's issue took a vested interest at birth liable to be divested). But it is contended that the gift to the issue is void altogether, because the limitations to the use of John Foran's widow for life with remainder to the use of children who might be born of her as his wife

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(1) 43 Ch. D. 246.

(2) 53 Sol. J. 100.

(3) [1910] 1 Ch. 1.

(4) (1889) 42 Ch. D. 494; (1890) 44 Ch. D. 85.

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involve a double possibility or contingency in that John Foran being a bachelor might marry a lady who was not born at the date of the deed. These limitations, it is argued, offend against what has been called the rule against double possibilities, but what is more accurately described by Farwell L.J. in *In re Nash* (1) as "the rule against limiting land to an unborn child for life with remainder to his unborn child." I think, upon the authorities, that this contention is well founded. I cannot read the judgments of Kay J. in *In re Frost* (2) and Neville J. in *Whitting* v. *Whitting* (3) without coming to the conclusion that the provisions of this settlement bring it within those decisions and that it contains just such limitations as Kay J. considered, and Neville J. held, to be void as offending against the rule. I must therefore hold that the limitation to the issue in remainder after the life estate of the widow is void.

Solicitors: *Charles Sawbridge & Son; Travers-Smith, Braithwaite & Co.*

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(1) [1910] 1 Ch. 1, 9, 10.

(2) 43 Ch. D. 246.

(3) 53 Sol. J. 100.

A. L.

SARGANT J.
1914
Jan. 30;
Feb. 2, 3, 4, 5.

W. H. BAILEY & SON, LIMITED *v.* HOLBORN AND FRASCATI, LIMITED.

[1912 W. 2399.]

Easement—Light—Interference—Effect of Acquiescence in Previous Interference by other Persons—Abandonment.

An abstraction of light coming over adjoining property, acquiesced in or consented to by the owner of the dominant tenement, does not entirely negative his right to an easement of light over other adjoining property, though it does not give him any further right over that second adjoining property so as to prevent the erection of a building which he could not have prevented had he not consented to the prior abstraction of light over the first adjoining property.

Staight v. *Burn* (1869) L. R. 5 Ch. 163, and *Ankerson* v. *Connelly* [1907] 1 Ch. 678, followed and applied.

Garritt v. *Sharp* (1835) 3 Ad. & E. 325, and *Blanchard* v. *Bridges* (1835) 4 Ad. & E. 176, distinguished.

TRIAL OF ACTION.

This was an action in which the plaintiffs, the lessees of Nos. 38 and 40, Oxford Street for a term expiring in the year 1920, claimed an injunction and damages against the defendants for obstruction of light. The plaintiffs carried on business on the premises as surgical instrument makers, and until the year 1911 the plaintiffs' premises had for twenty years and upwards enjoyed good and sufficient light. In that year extensive building operations were carried out by the owner of adjoining premises, numbered 34 and 36, Oxford Street, through a builder named Gilbert. These buildings (referred to in the arguments and judgment as "Gilbert's alterations") were calculated to interfere with the lights of the plaintiffs' premises, and an agreement dated August 24, 1911, was made between the parties interested under which Gilbert was allowed to raise his buildings to an agreed height of eighty feet—a similar right being given to the freeholders of Nos. 38 and 40 when the reversion in these houses should fall into possession—and to extend his buildings to the west so that they overlapped a part of the back of No. 38, provisions being inserted to secure as little interference as possible with the plaintiffs' lights. The consideration paid to the plaintiffs for consenting to these alterations was a money payment of 200*l*.

The defendants were the owners of other adjoining premises used as a restaurant, and in August, 1912, the defendants carried out extensive building alterations, involving the erection of an additional storey to their premises, which were alleged to cause a substantial interference with the plaintiffs' lights in respect of which the present action was brought. Amongst other defences the defendants contended that by their acquiescence in Gilbert's alterations in 1911 the plaintiffs must be taken to have abandoned or lost their easement of light over the defendants' property.

A. Grant, K.C., and *Theodore Ribton*, for the plaintiffs. The plaintiffs are entitled to a mandatory injunction according to the principles stated by Lord Macnaghten in *Colls* v. *Home and Colonial Stores*. (1) The buildings of the defendants will illegally darken or obscure the plaintiffs' light on the principles laid down in that case by the House of Lords, since they will prevent the plaintiffs from carrying on their business as beneficially as before. And even if the operations of the defendants alone would not amount to an actionable interference with the plaintiffs' rights, the effect of their operations taken together with the effect of those of others amounts to an interference which the Court will restrain: *Lambton* v. *Mellish*. (2) Nothing that happened in 1911 has deprived the plaintiffs of their right to bring this action. The fact that the owner of ancient lights has himself contributed to the diminution of the light does not preclude him from preventing subsequent interference by others: *Staight* v. *Burn* (3); *Baxter* v. *Bower*. (4) The authority of these decisions has not been affected by *Colls* v. *Home and Colonial Stores* (1), since in *Ankerson* v. *Connelly* (5), a case in which the decision of the House of Lords was applied, the Court of Appeal clearly recognized that a mere alteration by an owner of rights to light of part of his lights is not an abandonment or destruction

(1) [1904] A. C. 179, 186, 187.
(2) [1894] 3 Ch. 163.
(3) L. R. 5 Ch. 163.
(4) (1875) 44 L. J. (Ch.) 625.
(5) [1907] 1 Ch. 678.

of all his rights in respect of the residue. As to the plaintiffs' remedy the present case is a proper case for an injunction and not for damages: *Shelfer* v. *City of London Electric Lighting Co.* (1)

Cave, K.C., and *R. E. Negus*, for the defendants. An easement of light is lost if the owner of the dominant tenement alters the mode of enjoyment in such a way as to throw a heavier burden on the servient tenement: *Garritt* v. *Sharp* (2); *Blanchard* v *Bridges*. (3) The principle is the same as that relating to a right of way which cannot be used for extended purposes so as to throw an additional burden upon the servient tenement: *Williams* v. *James* (4); and see *Harris* v. *Flower*. (5)

[SARGANT J. referred to *White* v. *Grand Hotel, Eastbourne*. (6)]

In the present case the plaintiffs by acquiescing in Gilbert's alterations have changed their premises from well-lighted into ill-lighted premises, and like the defendant in *Ankerson* v. *Connelly* (7) and on the principle of that decision cannot resist a further diminution. But for the diminution which they themselves allowed there would be no substantial diminution of light to their premises by anything done by the defendants; and the plaintiffs cannot complain of the result of their own acts: see per Lord Robertson in the course of the argument in *Colls* v. *Home and Colonial Stores* (8), and *Higgins* v. *Betts*. (9) The easement which the plaintiffs now seek to set up is a totally new one. In any case damages are a sufficient remedy, and no case has been made for an injunction. [They also referred to Gale on Easements, 8th ed. p. 547.]

A. Grant, K.C., in reply.

SARGANT J. stated the facts and said that as regards Gilbert's alterations he entertained no doubt that, apart from the agreement, a good deal of the building in question could have been restrained by injunction at the suit of, amongst other persons, the plaintiffs, and that the plaintiffs were paid the sum of 200*l.* as the price of their not objecting to those alterations, and continued:—The defence to the present action divides itself into two main parts. The first part is based on the broad proposition that by what the plaintiffs agreed to in August, 1911, they have altogether abandoned their easement of light over the defendants' land. The second part of the defence is that, if that is not the case, there has been no such infringement of the plaintiffs' easement as to entitle them to relief. As to the first proposition, Mr. Cave contended that the quality of the plaintiffs' easement was altered, that an easement to have sufficient light for a well-lighted house, such as existed with regard to some at any rate of the plaintiffs' windows, including, I think, the crucial windows in the case, is an altogether different easement from the easement to have sufficient light kept for an ill-lighted house, and that any other view of the law would cast an intolerable extra burden upon the defendants in this case and in all other similar cases. I am unable to take that view. I quite accept the proposition that until at any rate twenty years have elapsed since the date of Gilbert's alterations the plaintiffs are not entitled to claim any greater easement over the defendants' land than they could have claimed apart from Gilbert's alterations, or rather apart from such part of Gilbert's alterations as was in excess of his legal rights and the rights of his employer. But I do not see any reason for saying that the plaintiffs have altogether lost their rights unless perhaps they had by their conduct rendered it practically impossible to say how much light they would have been entitled to under the old state of things. Several cases were cited by Mr. Cave in support of his proposition, comprising *Garritt* v. *Sharp* (1), *Blanchard* v. *Bridges* (2), and *Williams* v. *James* (3), which was a case of right of way. As regards *Williams* v. *James* (3), if the law is there laid down in the way in which Mr. Cave contended, I think that it has been a good deal altered and modified by recent cases such as *Harris* v. *Flower* (4), where the Court of Appeal, as I understand their decision, considered that a right of way to a piece of land carries a right of way to

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(1) [1895] 1 Ch. 287.
(2) 3 Ad. & E. 325.
(3) 4 Ad. & E. 176.
(4) (1867) L. R. 2 C. P. 577.
(5) (1904) 74 L. J. (Ch.) 127.
(6) [1913] 1 Ch. 113.
(7) [1907] 1 Ch. 678.
(8) [1904] A. C. 181.
(9) [1905] 2 Ch. 210.

(1) 3 Ad. & E. 325.
(2) 4 Ad. & E. 176.
(3) L. R. 2 C. P. 577.
(4) 74 L. J. (Ch.) 127.

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that piece of land after it has been altered by the erection of buildings upon it; the judgment in that case in favour of the appellants being clearly based on the fact that the right of way to the land in question was being used for the purposes not only of that land but of certain other land as well. But limiting myself to the first two cases which I have mentioned with regard to light, they do not in my opinion support Mr. Cave's broad proposition. I think that those two authorities deal with a very different question, namely, the case where there has been a great alteration in the mode of enjoyment by the dominant tenement. In my opinion the true view of the subject is to be derived from the consideration of *Staight* v. *Burn* (1) and *Ankerson* v. *Connelly*. (2) In *Staight* v. *Burn* (1) it was recognized that a change in the nature of the easement such as I have to consider—though in that case it was a much smaller change than in the present case—did not necessarily deprive the plaintiff of his rights, and in *Ankerson* v. *Connelly* (2) it was recognized, or at any rate no doubt was thrown upon the point by the Court of Appeal, that the plaintiff, while not entitled to cast any extra burden on the land of the defendant, was not deprived altogether of his rights over that land. I think myself that the true view of the law is suggested by a passage in the 8th edition of Gale on Easements, where at p. 547 the learned author says: "It would seem clear that, after an alteration in an ancient window whereby its size was decreased, the dominant proprietor would not be entitled to prevent the erection of buildings which, though obstructing the altered window, would not, before the alteration, have caused an illegal obstruction within the rule laid down in *Colls' Case*. (3) This principle was applied in *Ankerson* v. *Connelly*." (2) Converting that passage from a negative proposition into a positive proposition and applying it not to an alteration of a window but to an alteration in the light coming over adjoining property brought about with the assent or permission of the owner of the dominant tenement, it seems to me that it is true to say that an abstraction of light coming over adjoining property acquiesced in or consented to by the owner of the dominant tenement does not entirely negative his right to an easement of light over other adjoining property, though it does not give him any further right over that second adjoining property so as to prevent the erection of a building which he could not have prevented had he not assented to the prior abstraction of light over the first adjoining property. That being so, I cannot accept Mr. Cave's view that the plaintiff's right in the present case is entirely lost, and I have to look at the facts of the case to see how far the defendants' buildings have interfered with the rights of the plaintiffs on the footing which I have mentioned.

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(1) L. R. 5 Ch. 163.

(2) [1907] 1 Ch. 678.

(3) [1904] A. C. 179.

[His Lordship then examined the evidence in detail and came to the conclusion that the defendants' buildings would have caused a seriously detrimental abstraction of light sufficient to interfere with the ordinary comfortable enjoyment of part of the plaintiffs' premises altogether apart from Gilbert's alterations, and even more so, if he took into account, as he thought he must, that part only of Gilbert's alterations which was in excess of his legal rights and consented to by the plaintiffs, and said that under those circumstances on the footing of the law which he had endeavoured to ascertain he was bound to grant relief to the plaintiffs as experiencing at the hands of the defendants a nuisance which would have been a nuisance quite apart from Gilbert's alterations. His Lordship, however, considered, especially in view of the fact that the plaintiffs had themselves shewn by accepting a sum of 200*l.* formerly that they did not consider the preservation of the full light to their windows a matter of vital importance, that it was not a case for a mandatory injunction, and awarded the plaintiffs 150*l.* damages.]

Solicitors: *Rye & Eyre; William Negus.*

A. C.

C. A.
1914
Feb. 17, 18.

In re OXLEY.

JOHN HORNBY & SONS *v.* OXLEY.

[1912 O. 1298.]

Administration — Executors — Assets of Testator — No Power to carry on Business—Business carried on by Executors—Executors' Right to Indemnity — Rights of Creditors of Testator and Subsequent Creditors of Executors—Knowledge—Acquiescence—Priority.

Testator, a boilermaker, who died in 1908, by his will appointed his widow and his son his executors and devised and bequeathed all his real and personal estate to his widow absolutely. The will contained no power to the executors to carry on the business. The widow and son continued to carry on the business as executors until the beginning of November, 1912. The widow received certain weekly sums and the son was paid an ordinary salary as manager. All the testator's creditors with the exception of three had been paid. In November, 1912, two of the three unpaid creditors obtained the ordinary creditors' decree for administration. Both the plaintiffs were aware that the business was being carried on, but took no steps to interfere with it. In December, 1913, an application was made by subsequent creditors for a declaration that the executors were entitled to an indemnity out of the assets for debts incurred in carrying on the business in priority to the original creditors of the testator, and that the applicants and all other new creditors might have the benefit of such indemnity. Joyce J. refused the application. On appeal:—

Held, that as the executors had carried on the business for the benefit of the widow and not under an agreement with the testator's creditors, the applicants were not entitled to an indemnity out of the testator's estate in priority to the persons to whom the testator was indebted at his death.

Held, also, that merely standing by with knowledge that the business was being carried on and abstaining from interference with it were not of themselves sufficient to constitute the original creditors of the testator persons entitled to the subsequent assets and therefore bound to give effect to the indemnity.

Dowse v. *Gorton* [1891] A. C. 190, distinguished.

Dicta of Kekewich J. in *In re Brooke* [1894] 2 Ch. 600, 607, and of the Master of the Rolls in Ireland in *In re Hodges* [1899] 1 I. R. 480, 484, disapproved of.

Decision of Joyce J. affirmed.

Appeal from a decision of Joyce J.

Barker Oxley, who carried on business as a boilermaker at Leeds, by his will, dated May 19, 1908, appointed his widow, Mary Abigail Oxley, and his son Charles Jacob Oxley executors thereof and devised and bequeathed all his real and personal estate to his widow for her absolute use and benefit, subject to the payment of his debts. The will contained no power to the executors to carry on the testator's business.

The testator died on August 4, 1908.

The widow and son proved the will and continued to carry on the testator's business under the style of "Executors of Barker Oxley" until the beginning of November, 1912.

At the time of his death the testator owed various sums to creditors, and amongst others a sum ultimately agreed at 1000*l.* to John Hornby & Sons, a sum of 400*l.* to Jacob Utley, his wife's brother, and a sum of 620*l.* to Crossley & Davenport.

After his death John Hornby & Sons were paid by the executors 100*l.* in part satisfaction of the agreed sum of 1000*l.* and received from the executors a further sum of 150*l.* on account and interest at 5*l.* per cent. on the balances remaining due down to November, 1912. Jacob Utley was still owed the same capital sum as at the testator's death, but he had been paid interest down to June, 1912. Crossley & Davenport, whose claim against the testator's estate was 620*l.*, had continued to trade with the executors, supplying them with materials and obtaining from them manufactured work in return. By means of such trading and of a payment of 100*l.* made by the executors on September 6, 1912, the amount owing had been reduced to 221*l.* The other creditors of the testator had been paid their debts.

The three above-named creditors knew that the testator's business was being carried on by the executors, but took no steps to interfere with it.

The widow took no active part in the conduct of the business, but received sums varying from 3*l.* to 30*s.* a week out of it. The son was paid the ordinary salary of a manager usual in such a business.

On November 1, 1912, John Hornby & Sons and J. Utley (on behalf of themselves and all other creditors of the testator) issued an originating summons for the administration of the real and personal estate of the testator, accounts and inquiries, and appointment of a receiver.

On November 4 a receiver was appointed of the personal estate.

On November 7 the ordinary judgment in a creditors' administration action was pronounced and the receiver appointed by the order of November 4 was continued and appointed manager of the business.

On November 6 the executors filed their petition in bankruptcy and on the same day were adjudicated bankrupt.

On December 5 the solicitor to the receiver wrote to the solicitor to the trustee in bankruptcy and the new creditors a letter in which he said "It is of course understood that my client" (that is the receiver) "claims the whole of the assets."

On December 9, 1912, he wrote again "I reiterate that the receiver claims the whole of the assets."

On March 8, 1913, the present summons was taken out by J. Burns Dakin, Limited (who claimed to be creditors of the executors in respect of debts incurred by them in carrying on as executors the business of the testator since his death), and the trustee in bankruptcy of the executors, asking (inter alia) for a declaration that the executors as such executors were entitled in priority to the persons to whom the testator was indebted at his death to be indemnified out of his estate against all debts and liabilities incurred by the executors in carrying on the business to the full amount of such debts and liabilities or (if the executors were in default to the estate) to the full amount of such debts and liabilities after deducting the amount in respect of which the executors were in default, and that the applicants J. Burns Dakin, Limited, and all other creditors of the executors in respect of debts incurred by the executors in carrying on the business were (or that the trustee in bankruptcy of the executors was) entitled to be substituted for and subrogated to the rights of the executors and each of them in respect of such indemnity.

The summons was heard before Joyce J. on December 4 and 5, 1913. It then appeared that the summons had not been served on Crossley & Davenport, and the case was heard without their being represented.

Joyce J. dismissed the application. He said that in *Dowse* v. *Gorton* (1), on which the applicants relied, the conclusion arrived

(1) [1891] A. C. 190.

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at by the Court was that the business was carried on by arrangement with the creditors and really for their benefit. There was no such arrangement in the present case. In his Lordship's opinion the old creditors had not, either by reason of their knowledge and non-interference or by taking only the common decree, lost their priority. To hold that mere standing by was sufficient to postpone them would be contrary to what Lord Herschell said in *Dowse* v. *Gorton*. (1) In this case the widow was the sole beneficial owner, and the executors had, in his opinion, carried on the business for the benefit of themselves or one of them, and not for the benefit of the old creditors; no such arrangement nor any such state of things existed as would give the executors the right of indemnity claimed. His Lordship accepted the law as laid down by Rigby L.J. in *In re Millard*. (2)

The applicants appealed.

The appeal was heard on February 17 and 18, 1914. On the first day of the hearing it was suggested by the Court that Crossley & Davenport ought to be represented, and on the hearing being resumed on the following day, *Hughes, K.C.*, who appeared for the respondents, stated that he had received instructions to appear also for Crossley & Davenport.

Cunliffe, K.C., and *Horace Freeman*, for the appellants. The appellants are entitled to the indemnity they claim. They rely upon *Dowse* v. *Gorton* (1) and particularly upon the judgment o Lord Macnaghten in that case. The proper inference to be drawn from the facts in the present case is, it is submitted, that the respondents realized that their only prospect of obtaining payment of their debts was by allowing the business to be carried on and that they acquiesced in its so being carried on. It is not necessary in such a case to prove formal consent: assent will be inferred from conduct. Here by reason of their knowledge that the business was being carried on by the executors the respondents have by their non-interference therewith become bound by cquiescence. In *In re Brooke* (3) Kekewich J. said: "If they" (i.e., the creditors of the testator) "have not interfered, they must

(1) [1891] A. C. 190, 199. (2) (1895) 72 L. T. 823, 827.
(3) [1894] 2 Ch. 600, 607.

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be treated as having assented, and the indemnity of the executrix follows by reason of their assent." The same view was taken by the Master of the Rolls in Ireland in *In re Hodges.* (1) *In re Millard* (2) also shews that it is not necessary to prove a formal consent of the creditors to the business being carried on. Creditors of a testator who allow his business to be carried on after his death lose their priority after the expiration of a reasonable period within which the executors could have wound up the business. Further, by taking the common administration decree and not charging wilful default, the respondents have approved the carrying on of the business; and they have also done this by claiming the whole of the assets arising from the business.

Hughes, K.C., and *W. J. Whittaker*, for the respondents and for Crossley & Davenport, were not called upon to argue.

Cozens-Hardy M.R. This is an appeal from a decision of Joyce J., and it raises a point which has been presented to us in very able arguments as one of great difficulty. I am, however, bound to say I do not feel pressed with any of the suggested difficulties. The case is one in which a boilermaker made a will and appointed as executors his widow and one of his sons. The widow was the sole residuary legatee. The estate as sworn to by the executors for the purposes of probate was solvent, and I have not heard anything to satisfy me or even to suggest the probability that the estate was not perfectly solvent at the death. The will contained no provision whatever as to carrying on the business. There was no trust to that effect in the will, but the widow, who was obviously dependent upon what she could get from the business for her maintenance, carried the business on with the aid of the son who was co-executor and three other sons who were employed in the business and who received wages. The result was that the widow received from 3*l.* to 30*s.* a week, which supported and maintained her until the time arrived in the autumn of 1912 when the executors, who had carried on the business under the style of "Executors of Barker Oxley," got into difficulties, and execution was put in. That was followed

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(1) [1899] 1 I. R. 480, 483.

(2) 72 L. T. 823.

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by bankruptcy proceedings. It was also followed by an action, which is the one before us, commenced by John Hornby & Sons and J. Utley on behalf of themselves and all other the creditors of the testator against the executors. Now what was that action, and what was the decree that was made in it? It was a common administration decree. The only order that was made was for an account of the assets of the testator. I do not read the form because it is a perfectly well known common form. There is nothing whatever in it about assets which were produced by the trading subsequent to the death. It has nothing whatever to do with that, it is simply a proceeding in which admitted creditors say that there are assets of the testator which are still bona testatoris in existence and that they must be applied in payment of their debts. But then it is said that the executors carried on the testator's business for three or four years, and that they did it openly; they traded as executors. The creditors must have known and I assume did know, I think it is proved they did know, that the business was being carried on by the executors; and it is said there is something which entitles the executors to have a lien upon all the assets of the testator to indemnify them against the liabilities which they have incurred in carrying on this business; and it is said first of all that *Dowse* v. *Gorton* (1) decides this in their favour. Now *Dowse* v. *Gorton* (1) seems to me to be a case which is very strongly against the application and certainly is not in favour of it. *Dowse* v. *Gorton* (1) was a case where there was a trust to carry on the business; a trust of course which bound the beneficiaries under the will, bound them to give, not a personal indemnity, but an indemnity out of the estate in favour of the trustees who in the due exercise of that trust carried on the business. Then came the further question, were the creditors bound to give the same indemnity? Had they in fact put themselves in the true legal position of being beneficiaries or cestuis que trust under the trust contained in the will? It was held there, in circumstances to which I must briefly refer, that they had put themselves into that position, and that they could not in

(1) [1891] A. C. 190.

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those proceedings and having regard to the view which they themselves had taken in that action be allowed to approbate and to reprobate at the same time. Now the proceedings there which were taken were by originating summons by one of the true creditors of the testator which asked not merely that all the assets of the testator at the date of the testator's death, but that everything which was in existence at the date when the business ceased to be carried on by the executors, should be applied in payment of the debts of the testator, and in priority to any claim for indemnity by the executors—that is to say, those creditors sought to get the benefit of the subsequent trading without any provision for giving indemnity to the persons who had produced those assets. Now anything more unlike than the present case to *Dowse* v. *Gorton* (1) I cannot imagine. The plaintiffs here have never claimed the subsequent assets, which have nothing to do with them; they have taken simply a common administration decree. But in *Dowse* v. *Gorton* (1) the House of Lords, following the Court of Appeal, except in one respect, went into considerations which satisfied the noble Lords that there was an actual assent to the executors carrying on this business for the benefit of the creditors, and that being so it was not difficult to arrive at the conclusion which seems to me inevitably to have followed, that the creditor who had given that assent was in precisely the same position as a beneficiary under the will, and just as a beneficiary under the will could not take the subsequent assets without giving effect to the indemnity, so the creditor who deliberately elected to come in could not get the benefit of the subsequent assets without giving effect to the indemnity. That really is I think the substance of *Dowse* v. *Gorton.* (1) Lord Macnaghten gave a very elaborate and valuable judgment as to the rights of a creditor of a testator in a case like that, and he points out that if the creditor knows of the trading and is minded to do so he can take proceedings against the executors for a breach of trust for endangering the assets in carrying on the business more than may be required for the necessary disposal of the assets of the business. To me it is quite startling to suggest that a creditor of a testator, having a

(1) [1891] A. C. 190.

knowledge of that which he might claim to be a breach of trust, is bound by abstaining from taking proceedings to admit that the business was carried on with his assent and that he for all purposes must be deemed to have assented to that breach of trust. Take any other breach of trust than this. A creditor may know that executors have invested 10,000*l.* forming part of the estate in an improper security which has been lost. Is he to be deemed to have acquiesced in that, and to be debarred from claiming to be paid out of the true assets of the testator's estate which are left after the loss by reason of the breach of trust? I think the proposition really scarcely requires to be more than stated.

But then it is said that, assuming that assent or consent must be proved, it is sufficient to prove acquiescence—that is to say, not objecting for a considerable period of time. I am quite unable to assent to that view. I think the passage in Lord Herschell's judgment in *Dowse* v. *Gorton* (1), that "the mere fact that a creditor stood by under such circumstances, and did not immediately take steps to enforce his debt, would not of itself entitle the executors, as against him, to be indemnified out of the estate," puts that very clearly, subject only to the one point which Mr. Cunliffe made upon the word "immediately." I do not think there is any great stress laid upon that word, and if authority were wanted for the first time I should certainly be prepared to hold that merely standing by with knowledge of the trading and doing nothing is not of itself sufficient to constitute an original creditor of the testator a person entitled to the subsequent assets, and therefore bound to give effect to the indemnity to the executors. What, if any, are the acts of assent which are relied upon here? There are three original creditors. Suffice it so far as I am concerned to say that I do not think any single act which has been done by any of these creidtors brings the case within the assent or consent which is required by *Dowse* v. *Gorton.* (1)

But it is said there are the judgment of Kekewich J. in *In re Brooke* (2), and the judgment of the Master of the Rolls in Ireland in *In re Hodges* (3) to which I must also refer, which do

(1) [1891] A. C. 190, 199.
(2) [1894] 2 Ch. 600.
(3) [1899] 1 I. R. 480.

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not interpret *Dowse* v. *Gorton* (1) in this way, and which lay down propositions which entitle the appellant to succeed. But with great respect to Kekewich J. I cannot assent to the passages which I am about to read in *In re Brooke* (2) as being a correct statement of the law. Kekewich J. says: "Where, after the death of a trader, the business is carried on by the executor for some time, and then ultimately there is a conflict between the creditors, properly so called, of the testator, and the creditors of the business, that is, of the executor who carries on the business out of the assets of the testator, then it is for the creditors of the business to shew, if they can, that the business was carried on with the assent of the creditors of the testator, or for the creditors of the testator to shew the contrary. The creditors of the testator have their own remedy: they can step in at any time. They must be presumed to know of the death of the testator, and that the business is being carried on by the executor, and the law says that that cannot be done without their assent." With great respect to the learned judge, that is a proposition which cannot be maintained at all. "Therefore, if they have not interfered, they must be treated as having assented, and the indemnity of the executrix follows by reason of their assent." In so far as that states that mere standing by, mere knowledge, amounts to giving assent, I cannot assent to that view, and I think the dictum, or decision if you like, is one which cannot be the law. The Master of the Rolls in Ireland in *In re Hodges* (3) I think really follows what Kekewich J. said and, after quoting the passage very fully, takes the same view that mere knowledge and abstaining from interference is sufficient. He says (4), "the right of the creditor, like any other right, may be prejudiced or lost by acquiescence or neglect," and again he says, "Is it a case where the creditors have forfeited their rights by laches or acquiescence?" With great respect to the learned Master of the Rolls in Ireland, I think that in following Kekewich J. as he did he was following a decision which we ought not to consider as good law and which so far as necessary ought to be overruled by us. In the bankruptcy case of *In re*

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(1) [1891] A. C. 190.
(2) [1894] 2 Ch. 600, 607.
(3) [1899] 1 I. R. 480.
(4) Ibid. 484.

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Millard (1) two of the Lords Justices, though no doubt Lord Esher M.R. differed, took a view which seems to me quite inconsistent with the appellants' case. There it was plain that there was acquiescence. It was plain that there was knowledge, but this Court, or the majority of this Court, took the view that that was not such evidence of consent to the carrying on of a business for the benefit of the original creditors as was sufficient. They held there, and Rigby L.J. in particular held there, as I hold here, that the business was not carried on for the benefit of the creditors of the testator, but really, I have no doubt in good faith, for the benefit of the widow and the family of the testator, who of course for three or four years have been maintained out of the assets. Therefore for these reasons, which are substantially the reasons given by Joyce J. in his judgment, the appeal fails and must be dismissed with costs.

Buckley L.J. Where a trader dies leaving assets, including his business, and leaving creditors, including his trade creditors, the rights of his creditors are to have his assets realized in due course of administration and applied in payment of their debts. The dead man may or may not by his will have directed or authorized his executors to carry on his business. Whether he has done so is to the creditors immaterial. This is a case in which there was no direction in the will to carry on the business, but in point of fact the executors have carried on the business, and there arises a contest between certain creditors, who have become creditors after the testator's death in the carrying on of the business, and those who were creditors at the time of the testator's death; the former creditors claiming to be paid in priority by virtue of the assertion of the right of the executors to indemnity out of the assets of the testator for the liabilities of the business. That is the question which has been argued before us.

W B.

I propose only to say something upon two points which have been argued. The first is this. It is said that by certain letters of December 5 and 9, 1912, a claim was made on behalf of the creditors of the old business to all the assets including such as resulted from the carrying on of the business after the death of the testator. If the old creditors, those who were creditors of the testator, make a claim as they did in *Dowse* v. *Gorton* (1) to the assets of the business as existing at a date subsequent to the death and after the executors have carried on the business, it may well be that by so doing they are adopting the acts of the executors in carrying on the business, for they are saying that the assets thus acquired are their assets. That has not taken place in this case. What took place was that the old creditors issued their writ for administration of the estate of their testator. They took a common administration judgment directing inquiries, and an account of what was due to the creditors, an account of the funeral expenses, an account of the testator's personal estate coming to the hands of the executors of his will, and so on, and an inquiry as to the outstanding personal estate, and they obtained an order for a receiver which was limited in the same way to a receivership of the assets of the testator. In the letters which are relied upon, the receiver, I agree, put forward a claim to the assets as they were at a date after the carrying on of the business, and it is said that something arises upon that. To my mind nothing arises upon it. The receiver either was or was not entitled to those assets. In my view of the case he was not entitled; he was a receiver of the assets of the testator at the time of his death and as now to be found. If he claimed too much that had no effect as regards determining any question of whether or not the old creditors had claimed the assets arising from and had thus adopted the carrying on of the business. I put aside therefore any contention which is raised upon those letters of the receiver.

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(1) 72 L. T. 823.

The second point upon which I want to say a word is this, and this is the main point of the case. The death was in August, 1908; the business was carried on until 1912, a period of four years, or something of that kind—I agree a substantial time. The proposition which has been argued before us may be expressed thus: if with knowledge on the part of the old creditors, that is to say the creditors at the testator's death, the business has been carried on and the old creditors have not

(1) [1891] A. C. 190.

interfered, that amounts to an assent on their part to the business being carried on by the executors for them or for the estate, with the result that the executors are entitled to be indemnified out of the estate, and consequently the creditors of the subsequent business are entitled to avail themselves of that indemnity.

In my opinion there is no authority for that proposition; authority is against it. The assent referred to may be an assent in either one of three ways: (1.) assent to carrying on the business in fact, (2.) assent to carrying on the business for the old creditors as agents of the old creditors, or (3.) assent to carrying on the business for the estate of which the old creditors are creditors and against which they have a right to claim.

The most that can result from knowledge and absence of action of any kind is assent to carrying on the business in fact. The position is this: the old creditor is a person entitled to say, "You must not carry on this business, you are doing it wrongfully as against me"; by doing nothing he is simply abstaining from exercising a right of action which he would have. He would be entitled to insist that the business should be stopped and sold and that he should be paid. But it is a long step to say that by not intervening and insisting upon the business being stopped the old creditor assents to the executors carrying on the business for him as his agents so as to make him liable, or for the estate in the sense of acquiring further assets which will fall into the fund out of which he as creditor will be entitled to be paid. The argument that mere knowledge and absence of action one way or the other preclude the old creditor from saying that he stands upon his original rights is inconsistent with *Dowse* v. *Gorton*. (1)

The Master of the Rolls has already made observations upon the two cases of *In re Brooke* (2), which is a decision of Kekewich J., and *In re Hodges* (3), which is a decision of the Master of the Rolls in Ireland, and I do not think it necessary that I should say more than that I agree with what he has said. Kekewich J. says: "Therefore, if they"— that is

(1) [1891] A. C. 190.
(2) [1894] 2 Ch. 600.
(3) [1899] 1 I. R. 480.

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to say the creditors—"have not interfered, they must be treated as having assented, and the indemnity of the executrix follows by reason of their assent." With all respect to the learned judge that is not in my opinion a correct statement of the law. I think that is erroneous. In order to introduce the principle of *Dowse* v. *Gorton* (1) it must I think be established that the old creditor has so acted, either by claiming (as he did in that case) the assets of the continued business or by affirmative acts by which he so adopts the action of the executors in carrying on the business, as to shew that he has abandoned that which is prima facie his right, that which has been asserted by the plaintiffs in this case, to have the assets of their debtor administered in due course for payment of their debts, and that he has assented to another course, namely, that the fund to which he is entitled to look shall be risked in trade with the result that there may be loss or there may be further additions made for his benefit. It is necessary I think to shew an active affirmative assent. Mere standing by with knowledge and doing nothing is not sufficient.

For these reasons I think that this appeal fails.

Phillimore L.J. I agree that this appeal fails, and I might put my judgment in the language of the learned judge in the Court below; but after the discussion which has taken place I wish to add this. In *Dowse* v. *Gorton* (1) the House of Lords, affirming with a variation the order of the Court of Appeal, held that where a man carrying on business dies and leaves a will and the executors carry on the business in continuation, the executors may in respect of liabilities which they incur in carrying on that business have a right to an indemnity out of the assets of the testator's estate, and new creditors with whom the executors contract may stand in the shoes of the executors and have the same indemnity, and so a charge upon the assets of the testator which will come in priority to the claims of the testator's creditors. That may happen and will happen in one event which is thus stated by Lord Herschell and in slightly different language by Lord Macnaghten in the House of Lords in *Dowse* v. *Gorton* (1), Lord Hannen, the third noble and

(1) [1891] A. C. 190.

learned Lord, concurring with the other Peers. Lord Herschell puts it in this way (1): "Under the circumstances I think the proper inference is that the businesses were not merely continued for the benefit of those interested under the will, but that they were also carried on with the assent of the representatives of Luke Turner"—that is a creditor—"for the purpose of securing the payment of the debt due to them"; and Lord Macnaghten complains that the point to be decided has been assumed, namely (2), whether or not the "testator's businesses were continued for the benefit of his creditors."

Now that being the principle of law, we have to apply it to the facts. The business must be carried on with the consent, or assent if you like, of the testator's creditors, they recognizing that the business is being carried on for their benefit, and assenting to its being so carried on. In *In re Millard* (3) the members of the Court of Appeal differed as to the precise effect of the facts, but they all agreed, to use the language of the dissentient judge, Lord Esher, that there must be consent of the creditor that the business should be carried on. Unfortunately in *In re Brooke* (4) Kekewich J. thought that there was a further canon implied by the House of Lords' decision, and that standing by with knowledge was to be deemed to be consent, not to be a portion of the evidence of consent but to be deemed to be consent; and in *In re Hodges* (5) the Master of the Rolls in Ireland thought it becoming to follow the decision of another Court of first instance, that of Kekewich J. in *In re Brooke.* (4)

I agree with the other members of the Court that those two decisions go a great deal further than is warranted by the decision of the House of Lords in *Dowse* v. *Gorton.* (6) They laid down a canon which is not a canon in these matters. It still remains a question of fact whether or not the old creditors of the testator have consented to the business being carried on for their advantage, and that being a pure question of fact, I think the learned judge in the Court below came to a right decision, for it was not proved here that the old creditors of the testator

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(1) [1891] A. C. 200.
(2) Ibid. 202.
(3) 72 L. T. 823.
(4) [1894] 2 Ch. 600.
(5) [1899] 1 I. R. 480.
(6) [1891] A. C. 190.

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had consented or assented to the carrying on of the business at all, much less that they had assented to its being carried on for their advantage, and therefore I agree with his judgment.

COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for A. E. Masser, Leeds; F. B. Brook, for A. V. Hammond, Bradford.*

W. I. C.

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Jan. 24, *Feb.* 9, 14.

In re E. D. S., A PERSON OF UNSOUND MIND SO FOUND BY INQUISITION.

Lunatic—Real Estate—Estate Tail — Committee — Power to bar Lunatic's Estate Tail—Resettlement—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 108, 111, 120 (*a*), (*l*)—*Lunacy Act,* 1891 (54 & 55 *Vict. c.* 65), *s.* 27—*Fines and Recoveries Act,* 1833 (3 & 4 *Will.* 4, c. 74), *s.* 15.

The estate tail of a lunatic cannot be sold under s. 120 (*a*) of the Lunacy Act, 1890; but a lunatic's power to bar the entail is a power vested in him for his own benefit within s. 120 (*l*), and the judge, or the Master under s. 27 of the Lunacy Act, 1891, has jurisdiction in lunacy to authorize the committee to sell the property so as to bar the entail. Under ordinary circumstances the proceeds of sale should be resettled by the judge under his general jurisdiction so as not to prejudice the remaindermen.

Form of order of Lindley L.J. in *In re Noyes* (unreported, see note, p. 629, post) followed.

IN July, 1879, E. D. S. was by inquisition found to be of unsound mind, and the official solicitor was in May, 1913, appointed committee of his estate. Part of his property consisted of an estate tail general in possession under the will of N. D. in an undivided third part or share of certain hereditaments. The agent for the owners of the estate negotiated a sale of part of the property and the committee of E. D. S.'s estate applied by summons for leave to concur in the sale.

The Master in Lunacy doubted whether he had jurisdiction to make the order, and the matter was brought before Buckley L.J. on appeal, who adjourned it into Court.

Austen-Cartmell, in support of the summons. The question in this case is whether there is jurisdiction in the Master in Lunacy to make an order for the sale of land, of an undivided share in which the lunatic is tenant in tail in possession.

Sect. 116, sub-s. 1, of the Lunacy Act, 1890, deals with the extent of the administrative powers of the Judge in Lunacy, and s. 27, sub-s. 1, of the Lunacy Act, 1891, provides that subject to rules in lunacy the jurisdiction of the Judge in Lunacy as regards administration and management may be exercised by the Masters, and every order of a Master in that behalf shall take effect unless annulled or varied by the Judge in Lunacy.

By s. 120 of the Act of 1890 the judge may authorize and direct the committee of the estate of a lunatic to (*a*) "sell any property belonging to the lunatic"; and (*l*) "exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic."

The power of disentailing is vested in the lunatic for his own benefit, so it is submitted that if the case does not fall within sub-s. (*a*) it is at any rate within sub-s. (*l*). If the real estate is sold the lunatic's interest in the proceeds of sale remains the same as it was in the land itself: s. 123, sub-s. 1, of the Act of 1890, and *In re Pares.* (1)

[BUCKLEY L.J. The lunatic's property is not the land itself, but only an estate tail therein?]

Yes. It is desired to dispose of a larger estate in the land than the lunatic has, but he has power to disentail under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), and it is that power which the committee may be authorized to exercise on his behalf.

[COZENS-HARDY M.R. James L.J. in *In re Pares* (1) says that the right to bar an entail is not a power.

BUCKLEY L.J. Is there not a distinction between capacity and power?]

The capacity to disentail under the Fines and Recoveries Act is a power within sub-s. (*l*) of s. 120. No subject has the absolute ownership of land. The highest estate he can have therein is the fee simple, and his power of alienation is derived from statute: 18 Edw. 1, c. 1, the Statute of Quia Emptores. What is given to a person seised in tail by the Fines and Recoveries Act is the power to convey the fee to a purchaser subject to enrolment: s. 15. It is not necessary here to have a disentailing deed, because the lunatic, if he were sane, could convey the fee to a purchaser.

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(1) (1879) 12 Ch. D. 333.

[COZENS-HARDY M.R. An estate tail cannot be transferred: *In re Gaskell and Walters' Contract.* (1)]

That case depended on the Forfeiture Act, 1870. The property of a lunatic does not vest in his committee as the property of a felon does in the administrator. That is an entirely different case. The capacity given by the Fines and Recoveries Act to a tenant in tail to convey the fee is a power within s. 120 (*l*) of the Act of 1890.

An order was made in 1891 by Lindley L.J. in *In re Noyes* (2) in circumstances similar to the present, directing the committee of a lunatic tenant in tail to convey property of which he was tenant in tail in possession so as to bar the entail and convey the fee. That order should be followed in this case.

The dictum of James L.J. in *In re Pares* (3) that a right to bar an entail is not a power ought not to be followed; it is only an interlocutory remark, and there is nothing to shew that the learned judge was not satisfied by the answer of counsel. It is called a "power" in ss. 18, 19, 35, and 47 of the Fines and Recoveries Act. The modes in which dispositions of land under the Act by tenants in tail are to be effected, namely, by deed enrolled in Chancery, are pointed out in ss. 40 and 41.

Sect. 47 assumes that the capacity of the tenant in tail is a power of disposition. It is a power to execute a deed which when enrolled by either vendor or purchaser shall have the effect of conveying the property in fee simple; and it is in the nature of a power of appointment: *Cattell* v. *Corrall* (4); *Lord Lilford* v. *Attorney-General.* (5) It is a power annexed to an estate tail, and is treated as a power in *Bankes* v. *Small.* (1) [He also referred to *In re. Blewitt* (2) and *In re Earl of Sefton.* (3)]

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(1) [1906] 2 Ch. 1.

(2) Unreported. See note, post, p. 629.

(3) 12 Ch. D. 333, 335.

(4) (1840) 4 Y. & C. Ex. 228.

(5) (1867) L. R. 2 H. L. 63, 70.

C. Ashworth James, for the trustees of the will and a person entitled in remainder after the estate tail of E. D. S. We do not object to the sale provided the purchase-money is retained and settled subject to the same trusts as those on which the land is held; but there is a doubt as to the power to resettle. The judge cannot authorize the committee to sell this estate tail under s. 120 (*a*), for an estate tail is not property of the lunatic which can be assigned: *Hilbers* v. *Parkinson* (4); *In re Dunsany's Settlement* (5); *In re Gaskell and Walters' Contract.* (6)

Further, this is not a power which the committee can be authorized to exercise under s. 120 (*l*); it is a capacity given to a tenant in tail by the Fines and Recoveries Act, not a power within the meaning of s. 120 (*l*). The only authority on this point is the dictum of James L.J. in *In re Pares* (7) that "the right to bar an entail is not a power"; which must be taken to be his Lordship's concluded opinion although it was only an interlocutory remark. There is nothing to shew that he accepted the answer given by counsel. A power is a right given to a person to deal with property which does not belong to him. That may be held to include a power to disentail; but, even so, it is not within s. 120 (*l*), for it is not for his own benefit. The power of sale of a tenant for life under the Settled Land Act is not within (*l*) for that reason. If these proceeds of sale are resettled under s. 123 so that the lunatic's interest remains the same, the exercise of the power cannot be for his benefit.

It is suggested that the proceeds of sale can be resettled under s. 123, but that section only provides that as between the representatives of the lunatic the doctrine of conversion is not to apply. If this property is sold under the Lunacy Act the proceeds of sale will belong to the lunatic in fee, and the present remaindermen will lose their interest. It is clear that the Master has no power to resettle the property. The order of Lindley

(1) (1887) 36 Ch. D. 716.
(2) (1855) 6 D. M. & G. 187.
(3) [1898] 2 Ch. 378.
(4) (1883) 25 Ch. D. 200.
(5) [1906] 1 Ch. 578.
(6) [1906] 2 Ch. 1.
(7) 12 Ch. D. 333, 335.

L.J. in *In re Noyes* (1) was made under the general jurisdiction of the Court in Lunacy, and it may be that in that way the Court can in this case direct a resettlement of the proceeds of sale, as a term of a bargain: *In re Earl of Sefton.* (2) The quasi-committee of a lunatic not so found by inquisition cannot be authorized to exercise the lunatic's power of sale of settled lands under the Lands Clauses Consolidation Act, 1845: *In re S. S. B.* (3) It has been held that the Judge or Master in Lunacy has power to appoint a receiver of dividends under s. 116 of the Act of 1890 and s. 27 of the Act of 1891: *In re Browne.* (4) In *In re Baggs* (5) it was decided that the Court could not, in the case of a person of unsound mind not so found, authorize a sale under the Settled Land Act. In *In re Pares* (6), following *In re Bloomar* (7), it was held under the old Act that the Court had power under its lunacy jurisdiction to bar the estate tail of a lunatic, but the proceeds of sale must remain subject to the uses declared by the will. In *In re Earl of Sefton* (2) a settlement was effected as part of a bargain.

The object of this application might have been obtained much better and more cheaply under the Settled Land Acts, and we protest against the additional costs which have been incurred.

Austen-Cartmell in reply. We do not contend that the Master has jurisdiction to make this order if it does not come under the head of "Management and Administration"; but under s. 123, sub-s. 3, "the judge may direct any money to be carried to a separate account, and may order such assurances and things to be executed and done as he thinks expedient." This property should be sold and the proceeds carried to the account of the real estate of the lunatic. Nobody's rights should be preserved except those of persons claiming through the lunatic. There is nothing which calls for a resettlement.

Cur. adv. vult.

Feb. 14. COZENS-HARDY M.R. This appeal raises a question of some importance in lunacy jurisdiction. The lunatic is tenant in tail in possession. It is desired to sell the property. Can this be done in lunacy alone either by the Master or by a Lord Justice under the Act of 1890, or must it be done by a Lord Justice either under the powers conferred by the Settled Land Act, or under the general jurisdiction in lunacy? Sects. 116 to 130 of the Lunacy Act, 1890, are a group of sections headed "Management and Administration." Sect. 120 authorizes the judge (*a*) to sell any property belonging to the lunatic and (*l*) to exercise any power where the power is vested in the lunatic for his own benefit. It has been contended that the case falls within sub-s. (*a*), but I cannot assent to this view. An estate tail cannot be sold or transferred. See the decision in *In re Gaskell and Walters' Contract* (1), where it was pointed out that an estate tail is incapable of being transferred. The next contention is that the case falls within (*l*), and it is urged that the statutory right conferred by the Fines and Recoveries Act to bar the entail is a power vested in the lunatic for his own benefit. In *In re Pares* (2) there is an interlocutory observation by James L.J. that the right to bar an entail is not a power. But a careful consideration of the language of the statute has satisfied me that that observation cannot be supported. Sect. 47 of the Fines and Recoveries Act excludes the jurisdiction of the Courts of Equity as to the supplying of the want of execution of the powers of disposition given by the Act to tenants in tail, language which seems necessarily to imply that the capacity given by the statute to a tenant in tail to convey the fee—an estate larger than the estate tail—is strictly a power: see *Bankes* v. *Small.* (3) I think therefore that the lunatic tenant in tail has a power vested in him for his own benefit and that the case falls within (*l*), and that it is competent to the judge to order the committee to bar the entail.

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(1) Unreported. See note, post, p. 629.

(2) [1898] 2 Ch. 378.

(3) [1906] 1 Ch. 712.

(4) [1894] 3 Ch. 412, 417.

(5) [1894] 2 Ch. 416, n.

(6) 12 Ch. D. 333.

(7) (1857) 2 De G. & J. 88.

By s. 27 of the Lunacy Act, 1891, the jurisdiction in lunacy as regards administration and management may be exercised by the Master. I think therefore that it is competent to the Master to make an order that the committee shall execute a disentailing deed, the effect of which will be such as is stated in

(1) [1906] 2 Ch. 1.
(2) 12 Ch. D. 333, 335.
(3) 36 Ch. D. 716.

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s. 123. The remaindermen will be barred, but as between the real and personal representatives of the lunatic the proceeds of sale will continue real estate. This, however, does not dispose of the case. It is settled that the Judge in Lunacy ought not, in ordering a sale, to defeat the interests of the remaindermen. This is well illustrated by *In re Pares*, which is reported on two questions, one of sale, the other of mortgage. On the latter, which was a case of mortgage, the Court expressly directed (1) that the mortgage should be so framed as not to prejudice the remaindermen further than was necessary for giving effect to the mortgage. On the former Cotton L.J. says (2): "When asked under our jurisdiction in lunacy to sell the lunatic's estate, I am of opinion that, as between the lunatic and the remaindermen, or between the lunatic's heirs-at-law and next of kin, it is the duty of this Court not to alter the nature of the property or the devolution of the estate after the death of the lunatic"; and again: "If the Court in this case consents to a sale of the estate, it must be, in my opinion, only if the Court can secure the proceeds of the sale going in the same way as the estate would have done. If that cannot be done, or if there is no evidence that it is necessary for the maintenance of the lunatic to turn the estate into money, I think it would be proper not to sell it." And the order made in that case was, in effect, to resettle the proceeds of sale to the uses under which the estate was held.

We have been furnished with an order made by Lindley L.J. on June 23, 1891, exactly following the same principle and authorizing the committee to bar the entail so far as necessary to give effect to the sale "and that the proceeds of sale shall remain subject to trusts corresponding to the uses to which the said estate is now limited." In my opinion it would be wrong for us to sanction any departure from this principle. If the Master orders a sale it is not competent to him to order the proceeds to be resettled. That must be done by the judge under his general jurisdiction apart from s. 121. I think therefore that, in all cases where a sale is desired of the estate tail of a lunatic, the matter should be referred to the judge, who will,

(1) 2 Ch. D. 61.

(2) 12 Ch. D. 335.

in the absence of some special circumstances, order a resettlement. I may point out that if the sale is effected under the Settled Land Act the same result will follow.

We have been informed that orders have been made by the Masters ordering estates tail to be barred without making any provision for resettlement. To these orders the maxim "fieri non debet, factum valet" applies. In my opinion in the present case the order ought to be made by the judges and follow the form of Lord Justice Lindley's order. The costs of this appeal of both parties must be paid out of the lunatic's estate.

Buckley L.J. The lunatic is tenant in tail in possession of an undivided share of realty. There is no question but that the property could be sold by proceedings under the Settled Land Act or the Partition Act, but the question is whether in the lunacy jurisdiction alone an order can be made for sale, and, if it can, whether such order can be made by the Master without coming before the judge. By s. 120 (*a*) of the Lunacy Act, 1890, the judge may sell any property belonging to the lunatic, and by s. 341 "property" includes "real and personal property, whether in possession, reversion, remainder, contingency or expectancy, and any estate or interest, and any undivided share therein." The property of the lunatic in this case is an estate tail in possession, but that which it is desired to sell is the land. It is impossible to sell an estate tail. The vendor being entitled to an estate to himself and the heirs of his body cannot put the purchaser in possession of an estate to the purchaser and the heirs of his body. The land is not property of the limited owner: *Hilbers* v. *Parkinson* (1); *In re Dunsany's Settlement* (2); *In re Gaskell and Walters' Contract.* (3)

But under s. 120 (*l*) the judge may authorize the committee to exercise any power where the power is vested in the lunatic for his own benefit. Is the power or capacity conferred upon a tenant in tail by the Fines and Recoveries Act a power within that subsection? The power is conferred by s. 15 of the Act 3 & 4 Will. 4, c. 74. If the matter rested upon that section alone I should have serious doubt whether that which was created in the tenant in

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(1) 25 Ch. D. 200.
(2) [1906] 1 Ch. 578.
(3) [1906] 2 Ch. 1.

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tail was not a capacity or authority rather than a power. But my doubts upon this subject are resolved upon looking further into the Act. The language of s. 47 seems to me to conclude this question. It is a section which provides that in cases of dispositions of lands under the Act by tenants in tail the jurisdiction of Courts of Equity shall be excluded in regard to the supplying under any circumstances of the want of execution of such powers of disposition. This language is directly addressed to exclude the jurisdiction of Courts of Equity to aid the defective execution of a power. Another section which leads to the same conclusion is s. 35. It is a section which provides that where a base fee has been created, then so long as there is a protector of the settlement by which the estate tail was created the consent of the protector shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred to exercise the power of disposition contained in the Act. I am fortified in the conclusion at which I have arrived upon this point by the language of Cotton L.J. in *Bankes* v. *Small* (1) and of Stirling J. in *Mills* v. *Fox.* (2) Both those learned judges evidently considered that the remedy applicable to the defective execution of a power was the thing excluded by s. 47 of the Act. The dictum of James L.J. in *In re Pares* (3) cannot I think be regarded as any decision to the contrary.

It remains to consider whether under s. 120 (*l*) the power in the Fines and Recoveries Act is in the circumstances of this case vested in the lunatic "for his own benefit." In my opinion it is. It is a power by whose exercise he may entitle himself to the fee simple or the proceeds of the fee simple of that in which but for the exercise of the power he has only an estate tail. It is argued that upon this question s. 123 is material. In my opinion it is not. That section is one which affects the property to which the lunatic has by exercise of the power under the Fines and Recoveries Act become absolutely entitled. It is a section which by virtue of the jurisdiction in lunacy deals with that property to which he thus becomes absolutely entitled. But it does not affect his power to do such acts as that he shall become absolutely entitled. I conclude therefore that although the sale of the land cannot be made upon the footing that the land is "property" of the lunatic, yet that it can be made under s. 120 (*l*) in exercise of the power in the Fines and Recoveries Act.

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(1) 36 Ch. D. 716, 723.

(2) (1887) 37 Ch. D. 153, 162.

(3) 12 Ch. D. 333, 335.

Further looking at s. 123, that is not a section which requires that the property be resettled to the same uses. The true effect of that section is, I think, only to provide that as between real estate and personal estate the proceeds shall remain real estate as if conversion had not been made. It must be noticed that the section deals with nothing other than the interest of the lunatic and persons who by inheritance, representation, devise or assignment become entitled under him. There are no words to affect the remaindermen. And as regards the lunatic himself the effect of that section is not, I think, to reproduce in him the estate tail as if the disposition under the Fines and Recoveries Act had not been made. The words "if no disposition had been made" mean only as if there had been no conversion of realty into personalty.

It results that there is jurisdiction in lunacy to sell the land of which the lunatic is tenant in tail, but according to the practice of the Court in Lunacy the consent of the Court to the sale is given only upon the terms that the proceeds are resettled to the same uses as before. The imposition of this term is made by virtue of the general jurisdiction of the Judge in Lunacy and not by virtue of any sections of the Act relating to administration or management. The powers of the Master under s. 27, sub-s. 1, of the Lunacy Act, 1891, are confined to the jurisdiction as regards administration and management. Resettlement is not within this. The result, I think, is that it is competent to the Master to deal with applications such as the present, but that inasmuch as it will be a term that the resettlement shall be made the order must be brought before the judge in order that he may bind the parties by the imposition of this term. This ought not to create any practical difficulty in the office. The Master would go into the whole case and adjourn it to the judge only for the purpose of the imposition of this term, being as it is one which the judge and not the Master must impose.

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PHILLIMORE L.J. The question we have to determine is whether the Master in Lunacy under the powers given to him by the combined effect of the Lunacy Acts of 1890 and 1891 can by order direct the committee to concur in selling a plot of land of one undivided third of which the lunatic is tenant in tail in possession. By s. 120 of the Act of 1890, paragraph (*a*), the judge (which word now under s. 27 of the Act of 1891 includes the Master) may sell any property belonging to the lunatic. This, however, is not enough. It is desired to sell the fee simple, and the lunatic has not the fee simple in this piece of property. However, by paragraph (*l*) of the same section the judge may exercise any power where the power is vested in the lunatic for his own benefit. Is the exercise by a tenant in tail of his statutory right to convey the fee simple a power such as is contemplated by paragraph (*l*)? I am of opinion that it is. There is an expression by James L.J. in *In re Pares* (1) which might lead me to suppose that he thought otherwise. That case does not seem to me well reported. I am uncertain whether the reporter intended to do more than convey that this was the Lord Justice's preliminary opinion which was removed by the answer of counsel quoting s. 15 of the Fines and Recoveries Act, by no means the most effective section to quote, or whether he intended to represent that the Lord Justice maintained his opinion after the answer of counsel. Be this as it may, I think that other sections of the Act, particularly ss. 19, 35, 40 and 47, and the opinions of the three noble and learned Lords in *Lord Lilford* v. *Attorney-General* (2), shew that the statute gives to a tenant in tail that which in real property law is known as a power, and which is intended to be comprised under paragraph (*l*). We so generally speak of barring an entail that we may forget that this is not what the statute in so many words enables a tenant in tail to do. That which the statute enables him to do is to convey the land for a greater estate than that which he himself has. In the usual case he conveys to a grantee to uses and thus enlarges his own estate. But he may convey directly to a purchaser. His capacity to do this is a typical power, a capacity to create by deed or other instrument an estate which

(1) 12 Ch. D. 333, 335. (2) L. R. 2 H. L. 63.

he himself has not. This power may become a power in gross severed from any estate or interest in the land, as when a tenant in tail in remainder has created a base fee and yet is able when the estates preceding his former estate have come to an end, or (with the consent of the protector) before, to enlarge the base fee into a fee simple absolute.

Next is this power vested in a tenant in tail for his own benefit? This does not mean that the exercise of it in a particular case will be beneficial to him. It means that it is of the class of powers which are exercised or exercisable by the donee of the power for his own benefit, as opposed to fiduciary or quasi-fiduciary powers. It is for the benefit of a tenant in tail to enlarge his estate or to convey a larger estate to a purchaser. Therefore I think s. 120, paragraphs (*a*) and (*l*), enable the Master to do what is asked.

But when it has been done, the remainder will be destroyed, and it is the settled rule in lunacy to avoid anything that will prejudice the next of kin, heirs, or successors in title of a lunatic. I agree with the other members of the Court that s. 123 does not give power to resettle. It only preserves the nature of the property as real or personal. The Master cannot resettle; but under the general jurisdiction in lunacy a Lord Justice can provide that the proceeds of entailed property shall be held upon trusts corresponding with the uses on which it was held. As to the mode in which this should be done I refer myself to the greater experience of the other members of the Court, with whose direction I concur.

Solicitors: *W. H. Winterbotham; Wordsworth, Blake & Co.*

NOTE.—The order of Lindley L.J. of June 23, 1891, was made under the following circumstances:—

In November, 1882, Mrs. Mary Elizabeth Noyes, jointuress (the mother of the lunatic), commenced an action against the London Life Assurance and the trustees of that office, making the lunatic, who was the first tenant in tail of the property in question, and his committee co-defendants, for redemption of the settled estates and for accounts as against mortgagees in possession and charging wilful default.

The case before the Court of Appeal on the question of mortgagees in possession is reported *Noyes* v. *Pollock* (1886) 32 Ch. D. 53.

In proceeding under the judgment, accounts were rendered shewing

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3623*l.* 16*s.* 2*d.* due to the mortgagees in addition to costs and interest, and at this stage an agreement for compromise was made whereby the mortgagees were to recover what they could against the assets of the deceased mortgagor and to make no claim against any of the parties to the action nor against the property then remaining subject to the mortgage, which they were to reconvey. The mortgagees had in fact been paid off the bulk of their mortgage debt by sales before the action.

The material part of the judgment of Lindley L.J. was as follows:—

"Tuesday the 23rd day of June 1891.

"Upon reading a certificate in this matter of James Redford Bulwer Esquire Q.C. one of the Masters in Lunacy dated the 17th day of June 1891

"I do order:—

"1. That the East Mascall's Estate of the above named Thomas Herbert Noyes be sold at such time and place and in such manner as the Masters in Lunacy shall approve of and that Kennaway William Herbert Noyes do as committee of the estate of the said Thomas Herbert Noyes in his name and on his behalf execute and do all such acts deeds and things as shall be necessary for carrying such sale into effect and vesting the said estate in the purchaser or purchasers thereof in fee simple but so and in such manner only as that the deed or deeds to be so executed shall bar the remainders over expectant on the determination of the estate tail of the said Thomas Herbert Noyes so far only as shall be necessary to give effect to the said sale and that the proceeds of sale shall remain subject to trusts corresponding to the uses to which the said estate is now limited such conveyance or conveyances to be settled and approved of by the Masters in Lunacy."

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March 12, 13, 18;
April 9.
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Nuisance—Obstruction of Highway—Theatre—Collection of Crowds before Opening of Doors—Access to Adjacent Premises—Injunction—Regulation by Police.

In consequence of a popular performance daily, at 2.30 P.M. and 6.20 P.M., at the defendants' theatre of varieties, the access to the plaintiffs' adjacent premises was obstructed during important periods of the day by reason of the assembling of a crowd and the formation of a queue, at times five deep, on the kerb or in the gutter in front of the plaintiffs' premises previously to the opening of the doors of the theatre:—

Held by the Court of Appeal (Cozens-Hardy M.R. and Swinfen Eady L.J., Phillimore L.J. dissenting), that in the circumstances the obstruction was an actionable nuisance and the defendants were liable to be restrained by injunction, and that the failure of the police to prevent the obstruction by regulating the crowd and keeping proper gaps for the passage of the public through the queue did not afford a good defence.

Decision of Joyce J. affirmed.

Barber v. *Penley* [1893] 2 Ch. 447 approved.

Per Phillimore L.J. (dissenting): Every trader has a right to make his shop as attractive as possible and is not responsible because crowds stop to gaze at it. A fortiori, the defendants, whose attraction was in the future, were not responsible because crowds collected before the hour at which they were invited and caused an obstruction which it was the duty of the police to prevent. The evidence in the present case shewed that the queue was nearly as inoffensive as a queue could be, and to say that in such circumstances a queue was an actionable nuisance was a very mischievous proposition and one very much calculated to interfere with trade and business.

APPEAL from a decision of Joyce J.

The plaintiffs were lessees of, and were carrying on business as lace merchants and wholesale drapers in or upon, the ground floor shop and basement No. 3, Argyll Street, in the county of London, under an underlease granted in December, 1912, for fourteen years from November 11, 1912.

The defendant company, the Capital Syndicate, Limited, were the proprietors of premises situate in Argyll Street, formerly the site of Hengler's Circus but now of a music hall known as the

Palladium Theatre of Varieties, and the defendant Gulliver was the licensee of the music hall and the managing director of the defendant company. The defendants or their predecessors had for more than two years previous to the grant of the plaintiffs' underlease been carrying on upon the site of the defendants' theatre a duly licensed place of entertainment frequented by large numbers of people. The defendants' theatre was to the north of the plaintiffs' premises and on the same side of Argyll Street, which was a public highway, and the door of the theatre admitting to the upper circle, the cheapest part of the house, was on the side of the theatre nearest to and but a short distance from the plaintiffs' premises.

The defendants gave three performances daily, at 2.30 P.M., 6.20 P.M., and 9.10 P.M., and previously to the institution of this action the persons who desired to have seats in the upper circle were not admitted into the theatre except upon payment of an extra charge of sixpence until a short time before the commencement of each performance, the consequence being that a crowd of persons, larger when the performance was more than usually popular, gathered outside the theatre waiting for the door admitting to the upper circle to be opened. These persons, sometimes as many as five deep, were marshalled on the pavement or in the road by the kerbstone in the form of a queue extending usually in front of the plaintiffs' premises and often a long way past them, at times down to the corner at the south end of Argyll Street.

The plaintiffs complained that the collection of this crowd caused a nuisance to them by the obstruction thereby occasioned to the free access to and egress from their premises and by the interference thereby caused with the proper utilization and enjoyment of the same for the purposes of their business, and that in consequence they had suffered damage by loss of custom and otherwise, and they commenced this action on February 10, 1913, for an injunction to restrain such nuisance, and for damages and incidental relief.

The defendants denied the alleged nuisance and submitted that the control of the crowd in the highway was a matter for police regulation and that the metropolitan police had properly regulated and controlled the crowd, and alternatively the defendants pleaded that if any nuisance had been caused to the plaintiffs the same had been of a temporary character and was insufficient to entitle the plaintiffs to any relief.

Upon the motion for an interim injunction it was arranged that the doors of the theatre should be opened earlier than theretofore, and the alleged nuisance had in that way been considerably decreased.

The action came on for trial before Joyce J. on March 12, 13, and 18, 1913.

Hughes, K.C., *Farwell*, and *Stuart Green*, for the plaintiffs.
Cunliffe, K.C., and *Dighton Pollock*, for the defendants.

Cur. adv. vult.

April 9. Joyce J. This is an action by the lessees of the ground floor and basement of No. 3, Argyll Street, near Oxford Circus, against the proprietors of the Palladium Theatre, for an injunction to restrain them from carrying on their business so as to cause a nuisance to the plaintiffs by obstructing the access to or egress from the plaintiffs' premises, or causing any noisy or other interference with their beneficial occupation and enjoyment by the plaintiffs by reason of the assembly of crowds or otherwise, and damages and costs.

Upon the subject of annoyance by noise I have not heard anything at the trial. The door of the theatre admitting to the upper circle, the cheapest part of the house, and which I understood was large enough to accommodate something under 1000 persons—700 or 800, or something like that—is on the south side of the theatre, the side nearest to the plaintiffs, and a short distance from the entrance to the premises of the plaintiffs—I cannot at the moment say exactly how many yards it is, but there are three or four doors between. There are three performances daily, namely, at 2.30, 6.20, and 9.10. Before the action, the persons who desired to have seats in the upper circle were not admitted until a very short time before the commencement of the performance, the natural and necessary consequence being that there gathered outside a crowd of persons, larger when the performance was more than usually popular, waiting for the door to be opened. These persons, in order to prevent the entire stoppage of the street, appear to have been marshalled by the police (some of whom directly, or indirectly, are paid by the defendants) into a queue so as to form really a stationary crowd standing on the pavement or in the road by the kerbstone in front of the plaintiffs' premises, sometimes as many as five deep, and sometimes reaching a long way past the plaintiffs' premises, in fact down to the corner at the south end of Argyll Street. Consequently pedestrians going from or to the plaintiffs' premises had, at the time when the queue was there, to make their way through the crowd forming the queue or go round by the end so as to get inside the queue; and vehicles were prevented, and necessarily prevented, or hindered, from access to the side of the pavement immediately in front of the plaintiffs' premises. The plaintiffs are only concerned with the queue on the south side of the theatre at the door of the upper circle. There has been, and still is, I think, from time to time another queue on the north in connection with some other door, but that does not interfere with the plaintiffs in any way. Not only has there been this stationary crowd, but to a small extent street musicians and acrobats have been attracted by the crowd, tending further to obstruct the passage.

Upon the motion for an injunction it was arranged that the doors should be opened earlier than they had been before, and the nuisance, or alleged nuisance, has in that way to some extent been mitigated. As to what has been done pending the trial, there is no evidence that this has occasioned any additional expense or inconvenience to the defendants that is worth talking about. As I said before, it is only with the upper circle and the entrance thereto, not with any other part of the house, that the plaintiffs in this action are concerned.

Apart from any question of law, the practical question appears to be whether the door or doors admitting to the upper circle shall be opened so long before the performance begins as to prevent the formation of a waiting crowd, or whether the plaintiffs shall be subjected to the inconvenience and annoyance, whether great or small, of having a queue down the street in

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front of their premises at two periods of the day (the last one at night does not appear to be of importance) of persons waiting to enter as soon as the doors are opened. It has been said that no one has been actually prevented from entering or leaving the plaintiffs' premises, that they can always push or elbow their way through the queue which is there, or ask to have a way made for them; and there are police there, it is said, to interpose and make a passage if persons in the queue refuse to move. This may be so. Still, there is, to my mind, an annoying hindrance or obstruction to persons desiring to enter or leave the plaintiffs' premises. On the evidence I come to the conclusion that the crowd collected on the south side of the entrance to the upper circle, and the stationary queue, have obstructed access to and egress from the plaintiffs' premises, and, further, that such obstruction has been calculated to deter, and has in fact deterred to a very slight extent, at all events, if no more, customers from resorting to the plaintiffs as they might otherwise have done.

On behalf of the defendants it is also insisted, and it no doubt is the fact, that Argyll Street is not much used as a thoroughfare, or not so much used as many other streets in the vicinity, and that goods are delivered and taken away by vehicles or cycles from the various shops and premises in that street. In my opinion, this does not furnish any valid excuse to the defendants, but in truth makes it all the more necessary that the obstruction, if any, caused by these other things should not be increased. It has been also argued that the queue, and any consequent annoyance or damage to the plaintiffs, is no concern of the defendants, and if any one be responsible for it they say it is the police. This is an argument which I do not appreciate; in fact, I do not understand or follow it at all.

Among the usual and recognized nuisances on a highway which you find enumerated in almost any text-book are these. It is a nuisance to organize or take part in a procession or meeting which naturally results in an obstruction and is an unreasonable user of the highway, to use premises situate near a highway for exhibitions, entertainments, or other purposes of such a character that crowds of persons naturally collect and obstruct the highway, not by the mere act of coming and going but by remaining on it awaiting admission or watching the spectacle or endeavouring to obtain information as to what is going on out of their sight.

As to what is going on on the plaintiffs' premises I must hold that what the defendants have done involves an unreasonable use and obstruction of the highway, and incident thereto such obstruction and annoyance as to amount in law to a public nuisance by which the plaintiffs have been specially and in particular injuriously affected. The granting of the usual injunction asked in this case would in no way stop or interfere with the carrying on of the theatre or the employment of the considerable number of persons connected with the Palladium. It might necessitate a little more care and increase very slightly the expense of carrying on the concern, at present a very prosperous one. In other words, it might very slightly diminish the considerable profits which the management are deriving from the theatre. Upon the whole, I come to the conclusion that the plaintiffs are entitled to judgment for damages, say twenty shillings, and the costs of the action, but I do not consider it necessary to grant an injunction at present, because ultimately, and really under some repeated pressure from me, the defendants were induced to undertake to open the doors admitting to this upper circle an hour before the commencement, or the time advertised for the commencement, of the afternoon performance, and thirty-five minutes before the first of the evening performances, the intention and understanding of that being that as soon as the doors are opened persons seeking admittance to the upper circle are not to be kept back so as to form a queue in the street. There must be liberty to apply if this undertaking is not observed —I do not think I need say is not effectual, because I think it will be effectual if it is observed.

C. A. The defendants appealed. The appeal was heard on November 10, 11, and 12, 1913.

Cunliffe, K.C., and *Dighton Pollock*, for the appellants. In deciding whether a queue is a nuisance or not the Court will take into consideration all the circumstances of the case. Whether the user of the highway has been reasonable or not is a question of fact and not of law, and the learned judge was wrong in holding that a queue must necessarily be a nuisance: *Attorney-General* v. *Sheffield Gas Consumers Co.* (1); *Barber* v. *Penley* (2); *Attorney-General* v. *W. H. Smith & Sons* (3); *Inchbald* v. *Robinson.* (4) On the evidence it is clear that we have caused no obstruction. To be actionable the obstruction must be caused by ourselves or our agents; and in this case if any obstruction has existed it has been caused by the way in which the police managed the crowd. We are carrying on a lawful business in the ordinary way, and the public have a right of access to our theatre. The Court will have regard to the manner in which other persons carry on business and keep vans and carts waiting in the same street.

The Court will not interfere unless an obstruction arises by the defendant himself or his agents; or, secondly, by his invitation to the public to loiter and obstruct the highway; or, thirdly, where his action has caused the assemblage of idle and disorderly crowds. Here the first and third grounds are not suggested; and it is submitted that, inasmuch as the police have taken over the regulation of the crowd, we are not responsible for consequential obstruction under the second head: *Barber* v. *Penley* (2), where all the cases on this subject are collected, and *Wagstaff* v. *Edison Bell Phonograph Corporation.* (5) When a man is conducting his business in a lawful and proper manner he is not responsible for an obstruction in the street for which another body—in this case the police—are responsible. All the old cases on this point are obsolete. There was no effective police control in those days. Sect. 52 of the Metropolitan Police Act, 1839, and s. 24 of the Metropolitan Streets Act, 1867, have special reference to the control of theatre crowds by the police. The police are responsible, and if they neglect their duty the appellants are not liable for the consequences: *Barber* v. *Penley.* (2)

To succeed in this action the plaintiffs must shew a particular

(1) (1853) 3 D. M. & G. 304, 339.
(2) [1893] 2 Ch. 447.
(3) (1910) 103 L. T. 96.
(4) (1869) L. R. 4 Ch. 388, 396.
(5) (1893) 10 Times L. R. 80.

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injury to themselves beyond that which is suffered by the rest of the public: *Benjamin* v. *Storr* (1); *Fritz* v. *Hobson.* (2) Those cases shew that they must also prove that the injury is direct, not consequential, and substantial, not fleeting or evanescent. The plaintiffs have not proved this, and in fact they have refused to produce their books. There is no such proof of special damage as will entitle the plaintiffs to succeed. Some mere inconvenience is not sufficient: *Winterbottom* v. *Lord Derby.* (3)

Hughes, K.C., and *Farwell*, for the respondents. The true view is that if a man even in the conduct of a lawful business invites people to come and occupy a highway to the annoyance or inconvenience of the public there is a nuisance, and a particular or immediate neighbour suffering damage thereby can bring an action to restrain the nuisance.

[PHILLIMORE L.J. Your proposition comes to this—that a theatre queue which stretches in front of shops is a nuisance?]

Not a queue once or twice a week, but this queue is there twice in the daytime daily and at most important business hours.

That an obstruction of this nature is a nuisance has been settled by *Rex* v. *Moore* (4) and *Rex* v. *Carlile.* (5) There can be no better way of causing a crowd to collect than by inviting people to come to an entertainment and keeping the doors shut so that those people have to wait outside.

[PHILLIMORE L.J. *Rex* v. *Moore* (4) is not in point, because there the damage was caused by the people who caught the wounded pigeons, not by the crowd who came to look on.]

Rex v. *Carlile* (5) is a very strong authority for the proposition that if the natural and probable result of what the appellants are doing will be the collection of a crowd then they can be restrained, and it is no answer that they do not wish to cause a crowd or that the crowd is orderly or that it is the duty of the police to regulate it: *Barber* v. *Penley* (6); *Walker* v. *Brewster* (7); *Attorney-General* v. *W. H. Smith & Sons.* (8)

Cunliffe, K.C., in reply.

(1) (1874) L. R. 9 C. P. 400, 406.
(2) (1880) 14 Ch. D. 542, 555.
(3) (1867) L. R. 2 Ex. 316.
(4) (1832) 3 B. & Ad. 184.
(5) (1834) 6 C. & P. 636.
(6) [1893] 2 Ch. 447.
(7) (1867) L. R. 5 Eq. 25.
(8) 103 L. T. 96.

COZENS-HARDY M.R. This is an appeal from a decision of Joyce J., who has held that the plaintiffs are entitled to relief against the proprietors of the Palladium Theatre in respect of a nuisance caused by a queue formed by people going to the theatre later on, and extending in a queue, for a considerable period of time, opposite the plaintiffs' place of business.

In this case, as in every other, you have to consider the circumstances of the particular case, and you must apply what you believe to be the legal principle to the facts of the case so found. I disclaim absolutely any intention of saying that a theatre queue, under all circumstances, and in all conditions, must be an actionable nuisance. The only question which we have to decide is whether the queue at the Palladium, under the circumstances which I will shortly mention, is or is not a special nuisance to Messrs. Lyons, who are the occupiers of a place of business within a very few yards of the Palladium Theatre; I think there are two intervening shops between the Palladium entrance and the plaintiffs' shop.

What is it that the defendants have done? They have not, as most theatres have, a morning performance on two or possibly three days in the week, but they have every day a morning performance. Not only so, but they have every day an afternoon performance, as distinct from an evening performance. The only matters which are complained of, and to which the learned judge paid attention, are the morning and the afternoon performances, because, when you get to the evening performance, whatever takes place is so late that Messrs. Lyons, the plaintiffs, are not really prejudiced by that.

Now what is the state of things, or what was, before this action was brought, the state of things, with reference to (I will take) the morning performance? The Palladium was, and I have no doubt is, a very popular place of entertainment. The queue in question is formed by people who desire to get places in the sixpenny upper circle. On the evidence, as the learned judge has found, and I think we must accept his finding, that there has been such an unreasonable use and obstruction of the highway, and such obstruction and annoyance, as amounts in law to a public nuisance, by which the plaintiffs have been

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specially, and in particular, injuriously affected; and in an earlier passage he says: "On the evidence I come to the conclusion that the crowd collected on the south side of the entrance to the upper circle, and the stationary queue, have obstructed access to and egress from the plaintiffs' premises, and further, that such obstruction has been calculated to deter, and has in fact deterred to a very slight extent, at all events, if no more, customers from resorting to the plaintiffs as they might otherwise have done." The evidence leaves no doubt in my own mind at all that the finding of the learned judge, who saw the witnesses, is absolutely right on that point. The precise dimensions of the queue will vary from day to day possibly, and certainly from piece to piece, if I may say so; the more attractive the piece or the performance is, the greater are the crowds which come; but the substance of the grievance from which the plaintiffs say they suffer is this, that the theatre doors are not opened until either, I think, about a quarter of an hour, or sometimes about an half an hour, before the performance commences, and that there is a queue, extending sometimes beyond the plaintiffs' house right down to Argyll Place, and frequently right in front of the plaintiffs' premises; and that is a queue some three, four, five, or, on occasions, six deep, which is right in front of the plaintiffs' place of business; and it remains there for a very considerable portion of time, until the doors are opened, when, of course, those who can get in to fill the place do get in, and those who cannot get in, I suppose, go away.

Another peculiarity of this case is that the queue which is formed is not, to any appreciable extent, in front of the theatre premises; the Palladium people keep their own front clear, and leave the queue to stretch down to, and in front of, Messrs. Lyons' property. Then there is this to be mentioned, which seems to me not to be unimportant. The queue sometimes is on the footpath, and sometimes on the street itself, and it is said that the customers can make their way, elbowing their way through the crowd, or politely asking them to make way, or inviting the able assistance of the policemen who may happen to be there; or, if not, the defendants say, "Let them go round, down Argyll Place and up the other way, and get in, if they can, at the back of the queue." I cannot bring myself to doubt that this is a serious nuisance and annoyance, by which the plaintiffs are specially affected, and that it is not a case in which it is at all necessary for them to say "We can prove that we have lost 1*l.*, 2*l.*, or 3*l.*, by reason of this."

There is evidence by customers themselves that they avoided going there because of the inconvenience and trouble caused by this long queue twice a day right in front of the plaintiffs' house. I really think that, on that part of the case, the evidence speaks for itself. One must take one's own common knowledge of the world in a thing of this kind, and I say deliberately that I think it is quite obvious that a queue, more or less permanent, lasting not for a few minutes, but lasting for sometimes more than an hour, in front of this house, must be calculated to deter customers from coming to the shop. I should have come to that conclusion, I think, in default of any evidence, but there is evidence of customers, and there is evidence by the plaintiffs' managers and representatives that many complaints have been made to them by customers.

Then it is said by or on behalf of the defendants, "But we are not responsible for what goes on in the streets, it is the duty of the police to keep the streets clear, and if they do not do that, make a complaint to the police, do not attack us for collecting this crowd; we do not want them there; we only invite them to come in at the time when the doors are open, and when they are willing to pay their sixpences, and it is altogether unreasonable that we should be attacked because this number of people chooses, without any invitation from us, permanently to obstruct the roadway and the pathway, one or other or both, for a considerable period of time." Now is that the law? In my view it is not. I have no intention of going through the ancient authorities which were so fully discussed by North J. in the case of *Barber* v. *Penley*. (1) I am quite content not to do any more than take what Lord Cairns said in the case of *Inchbald* v. *Barrington* (2), that "There were authorities to shew that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection

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(1) [1893] 2 Ch. 447.

(2) L. R. 4 Ch. 388, 390.

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of those crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act,"—that is quite irrespective of noise, and quite irrespective of anything improperly done by the defendant in the sense of a matter which was indecent or anything of that kind, but it is a case where a man is carrying on his own lawful business, but doing it in such a way as he must know will, in all probability, in the natural course of events, lead to the obstruction of the street.

There are authorities to which our attention has been called again and again where indictments have been brought and maintained against, not the people who were actually obstructing the street by their physical presence, but against the people whose attractions really caused the crowd to come there. As I say, this matter was so fully discussed in *Barber* v. *Penley* (1) that I am not willing to waste many more words upon it, but I cannot feel any doubt that we should be not merely overruling *Barber* v. *Penley* (1) but going very much farther back if we allowed any hesitation in our expression of the law on that point. The charge of Park J., with whom Bolland B. was sitting, in the case of *Rex* v. *Carlile* (2), which has been read and which I will not read again, seems to me to be a clear and emphatic statement of that doctrine. It is the same doctrine which Lord Cairns in 1869 treated as the plain law, which was adopted by the Court of Appeal when the same matter came before them on appeal from the trial of the case; and which was cited again, not merely in *Barber* v. *Penley* (1), but by Stirling J. in a subsequent case, *Wagstaff* v. *Edison Bell Phonograph Corporation* (3), and I think, therefore, we must start with this as a proposition of law, that a man is or may be liable to an indictment for attracting, even by something lawfully done on his own premises, a crowd in the street adjoining his premises. But then it is said that all that is immaterial now because those decisions started at a time when there were no police whose duty it was to maintain order in the streets. I think police were in full force in 1869 when Lord Cairns said what he did, and the police were in force, although perhaps not with all their present powers, in 1834, when in the case of *Rex* v. *Carlile* (1) Park J. said what he did, and certainly the police were in full force when North J. and Stirling J. gave the decisions which they did. But then, strange to say, there is one argument which I have entirely failed to appreciate. It is said that *Barber* v. *Penley* (2) is an authority in favour of the appellants, because the learned judge said, "The police having done their duty I will not grant an injunction." Just consider what that case was. It was a case of a theatre, the Globe Theatre, in Wych Street. The plaintiff, who was the occupier of adjoining premises, complained that by reason of the performance of *Charley's Aunt* there was such a crowd which collected in the street that her lodgers and customers could not without very great inconvenience come into the house, and she was specially damnified thereby. The action came on on a motion which was treated as the trial of the action. The learned judge went into a very elaborate and careful revision of the authorities, and he held that it was an actionable nuisance in respect of which, if nothing more had happened, there would have been an injunction granted, but the plaintiff herself by her affidavit in reply stated that since the action commenced the police had intervened and the nuisance had ceased, and North J. then said that as the plaintiff herself admitted that the nuisance had by matters subsequent, namely, by a matter pending the action itself, ceased, he did not of course grant an injunction, but in order to shew his view upon the matter, the plaintiff was entitled to the costs of the action,—which was a plain assertion that the plaintiff was right in complaining of what she did, and North J. simply followed the ordinary practice, which is that where an actionable wrong has been committed, and has been removed during the course of the action before decree, the Court in the ordinary course does not grant an injunction, because the defendant does not threaten and intend to continue it, but the Court simply says "You were right in bringing your action, your action has had the effect of inducing steps to be taken to abate the nuisance; we therefore do not grant an injunction, but we simply give the plaintiff the costs of the action." I confess I am

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(1) [1893] 2 Ch. 447.
(2) 6 C. & P. 636.
(3) 10 Times L. R. 80.

(1) 6 C. & P. 636.

(2) [1893] 2 Ch. 447.

unable to appreciate how the defendants can escape from that which, in my view, is according to the settled law a wrong (namely, by collecting crowds and in that sense inviting them) by saying "it is the duty of the police to do what is necessary." In my opinion on the facts of this case, and on the facts of this case alone, there was at the date when this action commenced an actionable wrong in respect of which the plaintiff was entitled to relief, and would have been entitled to an injunction unless something had happened.

Now what has happened here? The learned judge suggested, I think, at an early stage that something should be done by which the doors should be opened at a certain time before the hours of the morning and afternoon performances. That, no doubt, involved some extra expense upon the defendants, but the effect of that, coupled with the exertions which have been made by Messrs. Lyons to induce the police to be a little more energetic than they have been, has in fact been so satisfactory that for a period now of six, seven, or eight months matters have gone on in such a way that the plaintiffs do not say that they have now any right to complain. Of course, if there was no actionable wrong at first, the learned judge had no right to bring any pressure to bear on the defendants to give an undertaking. I do not treat it as a voluntary undertaking, and they are entitled to say that they ought not to have had any such undertaking imposed upon them, but they preferred that to an absolute injunction. The learned judge accepted their undertaking in that sense, and in that sense only; and, in my opinion, that was an undertaking which would not interfere with the reasonable enjoyment by the Palladium Theatre of such rights as it possesses and will, at the same time, protect the plaintiffs from that which, in my opinion, was a distinct actionable wrong in respect of which they were entitled to relief at the commencement of the action.

This in substance is the view which Joyce J. took of the case; I agree with that view, and I think the appeal must be dismissed.

SWINFEN EADY L.J. I am of the same opinion. I disclaim altogether any notion that in this case the Court is called upon to decide whether a theatre queue is at all times in all places and under all circumstances necessarily a nuisance. The question which arises in the present case is whether the plaintiffs have established that this queue is a nuisance to them in respect of which they are entitled to maintain the action.

The plaintiffs carry on a business in the street in which the Palladium Theatre is situated, and they complain of two performances daily—the third evening performance is not the subject of complaint; so that it is not a case of an occasional matinée, it is a case of two daily performances, midday and afternoon, when a queue is formed in front of their premises. With regard to the facts, they appear to be not substantially in dispute. Before this action was commenced there was no gap in the queue even in front of the plaintiffs' premises, although the theatre front was kept quite clear from the queue. A space was kept in front of the theatre so that any one could drive up to the theatre without obstruction. The queue extended each side of the theatre. Joyce J. found the facts that the persons intending to enter the theatre assembled before the doors were open, and then they were "marshalled by the police into a queue so as to form really a stationary crowd standing on the pavement or in the road by the kerbstone in front of the plaintiffs' premises, sometimes as many as five deep"—occasionally it went to six or seven deep according to the evidence—"and sometimes reaching a long way past the plaintiffs' premises, in fact down to the corner at the south end of Argyll Street." Pausing there, we were told that that distance was something like twenty yards, and that if a person wished to approach the plaintiffs' premises all that he had to do was to go down to the end of the queue, twenty yards, and walk back inside the queue another twenty yards and he would ultimately arrive at the plaintiffs' premises. Then the learned judge goes on: "Consequently, pedestrians going from or to the plaintiffs' premises had, at the time when the queue was there, to make their way through the crowd forming the queue or go round by the end so as to get inside the queue; and vehicles were prevented, and necessarily prevented, or hindered, from access to the side of the pavement immediately in front of the plaintiffs' premises." Then he also finds that it is the fact that certain customers have not been able to approach the plaintiffs' premises, that is to say, not without difficulty, such difficulties as they did not desire to encounter, and have gone elsewhere rather than either request the crowd to make way for them and elbow their room through the crowd, or walk to the end of the queue and then walk back inside. Rather than be subjected to these annoyances they have taken their custom elsewhere. Then the defendants said that the plaintiffs have not produced their books so as to shew a falling off of custom. Their books would not shew any entries in respect of custom which went elsewhere; again it may be that the business was increasing and remained stationary in consequence of this. The books would not contain any indication of customers from time to time not going to the shop or taking their custom elsewhere. Then it was urged that really all that the defendants were doing was doing something lawfully on their own premises. That begs the question. No one complains of the way in which the theatrical performances are conducted. The real point is whether the acts of the defendants do not occasion crowds to assemble so as to occasion a nuisance to the plaintiffs. It was said that the police should move them on. Why? The very purpose for which they stand there would be defeated if they were moved on. The police, I am satisfied from the evidence, do their best to minimize the obstruction. They marshal the people, and make them stand in order a certain number deep so as to minimize the obstruction as far as possible; but it is not for the police to make them go away, because the whole object of their being there is to preserve their places and to get into the theatre, and if there were to be a forcible attempt to move these persons away from the theatre and send them elsewhere, a considerable disturbance would probably be created. But no one complains that the police do not do their utmost to minimize the obstruction which is caused, and to arrange them in such a way that, persons having been invited to the theatre and waiting until the door is opened at the commencement of the performance, occasions as little annoyance as may be.

Then I am pressed with this: since the matter was before the judge, in consequence of the undertaking the doors have been opened substantially earlier—I think under the order an hour earlier in one case and thirty-five minutes in the other. At any rate, at both performances the doors have been opened substantially earlier than they were before, and the plaintiffs have said that since that alteration has been made there is nothing of which they complain. It was urged that the defendants could not really prevent the obstruction; they did not ask the people to come earlier than the doors were opened, and they really could not prevent it; but the short answer to it is to shew how readily they have prevented it by opening the doors a little earlier, and in that way removing the cause of the obstruction.

In my opinion collecting a crowd of people to the annoyance of one's neighbours may be a nuisance. The authorities to which reference has been made clearly establish this, that if the natural and probable consequence of what the defendant is doing is to collect a crowd so as to obstruct the highway, that may be an indictable nuisance, and, if it is one which occasions damage to an individual, may give him a right of action in respect of it. I need not go further than the case of *Rex* v. *Moore*. (1) That was in 1832; it is some eighty years old. That was in part a case of pigeon shooting, but the third and fourth counts of the indictment had no reference to pigeon shooting. The defendant was found guilty on four counts. Lord Tenterden put it in this way: "The defendant asks us to allow him to make a profit to the annoyance of all his neighbours"—that is substantially what the defendants are asking us here, to allow them to make a profit to the annoyance of all their neighbours. "If not, it is said we shall strain the law against him. If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle." Then Littledale J. gives judgment to the same effect: "It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position; because if it be the *probable* consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it." It is manifest here that if there is a popular performance at the Palladium, and the opening of the doors is but a short time before the performance commences, the inevitable result will be that persons desirous of securing good positions will attend some time before the doors are opened and so create an obstruction. Then Taunton J. refers with approbation to a passage which has been cited and commented upon. He refers to it in Hawkins' Pleas of the Crown; it was taken originally from Holt C.J. in *Betterton's Case* (1), and he cites that passage with approval: "'It hath been holden that a common playhouse may be a nuisance if it draw together such numbers of coaches, or people, etc., as prove generally inconvenient to the places adjacent.' The present is a very similar case." That was the law in 1832 following the older cases. Then in 1834 there was the case of *Rex* v. *Carlile.* (2) In that case Carlile was indicted for a nuisance. He had exhibited some effigies in his window. Park J.—Bolland B. was sitting with him—in summing up the question to the jury put it in this way: "The gravamen of a charge like this is not whether those effigies were libellous, but whether the defendant, by the exhibition of them at his windows, caused the footway of Fleet Street to be obstructed, so that the public could not pass as they ought to do and the main question is, whether His Majesty's subjects have been annoyed in this respect." A reference was made in this case to the case of Tregear, who had been tried a few years before, that is to say, a few years before 1834. "A few years ago, a person named Tregear was tried for a nuisance. He kept a caricature shop in Cheapside, at the corner of Wood Street; and he, by placing caricatures in the window of his shop, caused an obstruction in the footway by the people standing to look at them"—that is to say, he exposed his goods in the way of his trade and made his windows as attractive as he could. "He was convicted at the London sessions"—and then this is the statement of the defendant: "but the Recorder afterwards considered that it was not an indictable offence, and no sentence was ever passed on the defendant." That was a mistake, because Park J. said with regard to that that the defendant in alleging that had been completely misinformed, and that that statement was totally unfounded. He said: "I have seen the learned Recorder, and he desired that I would relieve him from the imputation of the bad law that is ascribed to him. He says, that he never had any doubt about the law of the case, or the perfect propriety of the conviction; but that, as the defendant submitted and abated the nuisance, no sentence was passed." That is the case of *Rex* v. *Carlile.* (1) Then the next case was a civil proceeding, *Walker* v. *Brewster.* (2) That was a suit for an injunction—a bill—and it was for collecting a crowd of noisy and disorderly people to the annoyance of the neighbourhood. It first came on on an interlocutory application for an injunction, and in this case Wood V.-C. said: "It appears to me that a clear case of nuisance is established in the collecting of the crowd alone." He referred to the earlier cases; he referred to *Rex* v. *Carlile* (1) and to *Rex* v. *Moore* (3), and he refers to the nuisance as assuming a much worse form, as persons cannot reach their houses without having to force their way through these crowds, and then he held "that a clear case of nuisance is established in the collecting of the crowd alone." That was in 1867, and that was followed in 1869 by a case which is important because it contains a statement of the law by Lord Cairns, sitting first as a Lord Justice to hear an interlocutory appeal, and that statement was approved by the Court of Appeal at a subsequent stage of the same action. It is the case of *Inchbald* v. *Barrington.* (4) That was a case about a circus. Lord Cairns thought that there was not sufficient evidence for an interim injunction and he dissolved it, but he stated the law. He said: "There were authorities to shew that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance, and that if the collection of those crowds was to be attributed to the act of a particular individual, that individual might be restrained from the commission of that act."

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(1) 3 B. & Ad. 184, 188, 189.

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(1) (1695) Holt, 538; 5 Mod. 142; Skin. 625.

(2) 6 C. & P. 636, 645, 647, 649.

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(1) 6 C. & P. 636.

(2) L. R. 5 Eq. 25, 31.

(3) 3 B. & Ad. 184.

(4) L. R. 4 Ch. 388, 390, 394.

Then the case was tried, and on appeal Selwyn L.J. said: "A number of cases have been referred to, but the law applicable to the subject is now well settled, and has been clearly laid down by Lord Cairns in the present case." That is an adoption by the Court of Appeal of Lord Cairns' statement of the law. That action was followed in 1893 by *Barber* v. *Penley* (1)—I will not refer to that again as the Master of the Rolls has dealt with it in detail—and again a little later in the same year by Stirling J. in the case of *Wagstaff* v. *Edison Bell Phonograph Corporation.* (2)

In my judgment there can be no question about the law. Whether the facts in each individual case constitute a nuisance depends upon the degree of annoyance and obstruction which is caused, but in the present case I am satisfied that the plaintiffs have established an intolerable nuisance, and an actionable nuisance, and one which the defendants are and have been able to obviate by a slight alteration in their arrangements. One would have thought that the comfort of persons attending the theatre would be much greater if they were admitted an hour, or half an hour, earlier instead of having to stand in the wet and in the mud in the gutter. The new arrangements so far as the plaintiffs can see appear to have worked well; there is nothing now of which they can complain. I am satisfied that when the action was brought there was an actionable nuisance in respect of which they would have been entitled to an injunction, but the arrangement made at the trial was an excellent substitute for the injunction.

For those reasons I am of opinion that the judgment of Joyce J. was right, and that the appeal fails.

PHILLIMORE L.J. I have the misfortune to differ from Joyce J. and from the other members of this Court and I express my opinion with a very considerable diffidence, but having after much reflection a formed opinion on the subject, I think it my duty to express it.

The facts of this case need not be dwelt upon. There is no dispute of fact except as to the degree of what happened. There is a music hall which has three performances a day, two of which take

(1) [1893] 2 Ch. 447.

(2) 10 Times L. R. 80.

place at such a time that those who assemble to enter it are there while shops are open; and the plaintiffs' shop is one close to the music hall. People anxious to get in arrive before the time when the doors are opened. They are not entitled, using the highway to stop on the highway and stand still more than a reasonable time. It is an obstruction of the highway for a person to stand in the highway for more than a reasonable time, and the police, at any rate in the metropolis, have a power to move such people on. Instead of moving them on, or instead of sending them backwards and forwards up and down the street, the police take the very reasonable course of forming these people into queues, forming them in the sense that they permit them to stand (which is the real form) on terms that they stand in an orderly queue. Perhaps even without the intervention of the police, the common sense and good manners of the various people will make them organize themselves into a queue instead of scrambling and struggling for the first place. That queue, so formed by people who wish to go to a theatre and who have no right to stand there except that on the whole it is the most reasonable use of the highway that they should stand under the control of the police and in organized queues, instead of walking backwards and forwards and scrambling, is said to constitute a nuisance created by the owners of the theatre, who invite these people to come to the theatre, and which is actionable at the suit of the plaintiffs, who occupy an adjacent shop. Accordingly the plaintiffs have asked for an injunction restraining the defendants from so carrying on the business as to cause a nuisance to the plaintiffs by obstructing the access to or egress from their premises or any noisy or other interference with the beneficial occupation and enjoyment thereof by the plaintiffs, by reason of the assembly of crowds or otherwise; and that injunction is the injunction which Joyce J. was prepared to have granted, only, for reasons which I am about to mention, he has taken instead an undertaking to open the doors at a particular time. The part as to noise, of course, disappears—I meant to mention that. He has taken an undertaking by the defendants to open their doors at a particular time, which he has conceived will prevent the nuisance; and it is from that undertaking that the defendants seek to be relieved.

The police, as I have said, have a power of controlling this crowd, and it appears that latterly they have exercised their power of control in this way: they have insisted first of all on there being a sufficient space at the doors of the theatre for a carriage or carriages to drive up. That is their doing, not the defendants'. They have then insisted on this queue being not more than a certain width, on its going, as a rule, into the roadway and off the pavement; and they kept always one gap and latterly since the action, I take it, they have kept a second gap opposite the plaintiffs' premises. Whether they ought to have kept a gap in front of the plaintiffs' premises before action brought, whether they ought to have more gaps, whether they ought to allow a queue at all, are all matters which relate to the police. Complaints with regard to that should be made to the higher police officials, if the police are not doing their duty. I cannot help thinking that in this very case (I make no reflection upon the police), if there had been a little more insistence on the part of the plaintiffs, and possibly a little more appreciation on the part of the police, and a gap had been made and kept outside the plaintiffs' premises, we should never have heard of this action.

I have inquired whether the result of this decision is, in the view of the respondents, to prevent all theatre queues, and Mr. Hughes has answered me very frankly and very fairly with regard to that. He says "There are certain distinctions here: first of all it is not a theatre which has a morning performance once or even twice a week, this is a performance every day, and twice a day at material times; and secondly there are many theatres which have a larger frontage to the street, and with regard to which it may possibly be that no queue extends beyond the frontage, and I am prepared to say and contend that if a queue extends beyond the front of the theatre and extends in front of either a private house or a shop and is sufficiently often there, it is an actionable nuisance, and will entitle the aggrieved person to obtain an injunction." After that I think myself it is idle to say we are deciding this case on the special circumstances of the case. The special circumstances of the case are that this is very nearly as inoffensive a queue as can be seen, at least that is my view of the facts as they stand, and therefore I think this decision one of considerable importance.

Now it is suggested that it is so very easy for the defendants to cure the mischief. I do not know that we have any right to impose on one of the King's subjects that he shall do something in the conduct of his business which he does not wish to do, on the ground that it does him very little hurt and will save his neighbour from a great deal, unless the neighbour has a right of action; and I confess I appreciate Mr. Cunliffe's observations that we do not know really that this is a cure. It is not that the plaintiffs admit that it is a cure, it is that the plaintiffs assert that it is a cure, and I am not sure that they are right. In the summer months it may well be that the opening of these doors half an hour earlier may save mischief, and it may be so if the performance is not very attractive; but one's experience of the world is that if a thing is sufficiently inviting people will come sufficiently early, and if you open your doors half an hour earlier it may only throw the starting of the queue back half an hour before. That is all really that I think it necessary to say upon the facts. I think it comes to this, that we have got to decide whether such a queue is an actionable nuisance.

Now I am afraid I must travel through a few of the cases, and I must frankly say that with the exception of *Inchbald* v. *Robinson* (1) (which I think upon reflection supports the appellants' contention) the cases require to be distinguished and prima facie are all in favour of the respondents. But, nevertheless, I think they ought to be distinguished, and I think the proposition for which the respondents contend is a very mischievous proposition and very much calculated to interfere with trade and business. I will deal with the cases in order of date.

About *Betterton's Case* (2) I need say very little except that it has been relied upon in other cases, and I do not think it is any authority at all. There are no less than three reports, or notes, about *Betterton's Case* (2); there is one in Skinner's Reports, there is one in Holt's Reports, and there is one in 5 Modern Reports, and it appears that at any rate *Betterton's Case* (2) began in this way. What one may call a prerogative writ of

(1) L. R. 4 Ch. 388.

(2) Holt, 538; 5 Mod. 142; Skin. 625.

prohibition, not in an action, was issued by the Court to prevent the opening of "the New Playhouse," as I think it was called. Skinner himself was one of the people who applied for the writ, and he says in his account of it, that at a later stage they came to him for advice, and he did not really like taking up the matter as he was himself, nominally at any rate, one of the people who had applied for the prohibition, or is recited to have applied for the prohibition. Whether the prohibition issued, as prohibitions in those days very often did issue, entirely ex parte and without motion to the Court on a mere suggestion (an evil much complained of by the judges of the Ecclesiastical Courts and on which there is a great deal of interesting discussion in Lord Coke's Institutes, Part II., pp. 599—619), whether it issued on a mere suggestion and then, equally on a mere suggestion, an attachment was moved for on the ground that the prohibition had not been obeyed, and then the suffering persons came to move to dissolve the attachment, or whether, before the attachment, in some way they made an application to stay proceedings, I have not yet, in the time at my disposal, been able to discover, but at any rate what the Court said was this: "You are not aggrieved by the prohibition going, you are not aggrieved by the attachment going, because you can plead to it. It is something which you can traverse, and then the very truth of the matter will be tried"; but Sir Bartholomew Shower, who was one of the advocates, would not have even that; he said that they were aggrieved, and then the Court adjourned the matter for further consideration, and apparently it dropped. Certain observations were made about playhouses, and how far they might be considered as nuisances. With regard to that, again I have not had time to look into the matter, but I think it will be found that in those days the Courts exercised a kind of executive control in assizes and quarter sessions, and probably in London by the Court of Queen's Bench, over all places of public amusement, and probably over alehouses, until the Licensing Acts grew up. I merely mention one illustration which I have found in Mr. Sidney Webb's book on English Local Government, vol. iii. p. 172, where it appears that on a complaint of the inhabitants the magistrates summarily closed all theatres and dismissed the players out of the town. I think that is the origin of the writ of prohibition which went in *Betterton's Case.* (1) I observe that it is pointed out by the Court that the complaint really was that of the patentees of a rival theatre and not of any inhabitants who suffered by a nuisance. I have said all that is necessary and perhaps more than is necessary about *Betterton's Case.* (1)

Now I come to the case of *Rex* v. *Moore.* (2) That I think wants a little careful consideration. I think Selwyn L.J. points out one very important matter in regard to *Rex* v. *Moore* (2) in his judgment in *Inchbald* v. *Robinson* (3), to which I am coming in a moment. There were four counts in the indictment. The first and second were that the defendant kept "certain inclosed lands, grounds, and premises near to the King's highway, and to private dwelling-houses, for the purpose of persons frequenting such grounds and meeting therein to practise rifle shooting, and to shoot at pigeons with guns, and that he did unlawfully and injuriously cause divers persons to meet and frequent there for that purpose; and did unlawfully and injuriously permit and suffer and cause and occasion a great number of idle and disorderly persons, armed with guns and firearms, to meet and assemble in the streets, highways, and other places near and about the said inclosed premises of him (defendant), discharging firearms and making a great noise, disturbance, and riot, by means whereof the King's subjects were disturbed, and put in peril." Those seem to be the two counts slightly summarized; it is a little difficult to see where one count ends and the other begins. "The third and fourth counts were for keeping a ground for rifle shooting at a target, and causing persons to assemble and shoot there, by means whereof the King's subjects were disturbed and put in peril." He pleaded not guilty. It was proved that he was a gunmaker, that he had taken some land and converted it into a shooting ground where persons came to practise with rifles at a target and to shoot at pigeons; separately they shot at a target and at pigeons. "It was also proved that, as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds and in the neighbouring fields to shoot at the birds as they strayed; these persons were called scouts; and there was some evidence to shew that the defendant employed people to keep them off his own grounds. Some injuries were said to have been received from the bullets and shot used in these grounds; but, as the defendant contended, they arose entirely from the scouts, for whose acts, he urged, he could not be responsible. Lord Tenterden, however, thought otherwise, and directed the jury to find him guilty on the first four counts"—that is all the four mentioned—"but reserved leave for him to move to enter a verdict of not guilty on the first two." Therefore, the third and fourth counts for keeping a ground for rifle shooting, by means whereof the King's subjects were disturbed and put in peril, were held good counts, and there can be no doubt that they would be perfectly good counts, and if there were some stray shots from that which did some mischief, there would be no reason for giving the defendant leave to move with regard to them. With regard to the other two he moved and failed, and in my opinion he failed because what he did was the act of dispersing pigeons over the ground, and thereby inducing people to come and shoot them; and I think he was responsible, on the same sort of principle as anybody is who sends any animal under his control out of his control, either on to the highway or on to his neighbour's grounds. "Here the defendant" says Lord Tenterden "invites persons on his own ground to shoot pigeons. The effect of that is, that idle people collect near the spot"—why? Not to witness the entertainment; nobody suggests that, but to shoot. "They tread down the grass of the neighbouring fields, destroy the fences, and create alarm and disturbance." Then Littledale J. follows that up by saying that of course he does not want the idle people there; but that is the probable consequence of what he has done, and thereupon he is convicted. I think that case, as I think I shall shew in a moment Selwyn L.J. thought, turns as regards those two counts on the fact that he dispersed the pigeons about.

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(1) Holt, 538; 5 Mod. 142; Skin. 625.

(2) 3 B. & Ad. 184.

(3) L. R. 4 Ch. 388.

The case of *Rex* v. *Carlile* (1) is no doubt in many respects a very strong case for the respondents, and it must be agreed

(1) 6 C. & P. 636, 649.

that, in the course of his summing up, Park J., who no doubt spoke with the approval of the other judges who were on the bench, Bolland B. and Sir John Cross, did refer to and explain what the Recorder had done in the case of Tregear. Mr. Carlile, who was conducting his own defence, did what some counsel do, and what almost every defendant in person does, that is to say, introduce a quantity of irrelevant matter, and seemed ill-informed as to the irrelevant facts; and he said: "What a shame to prosecute me when Mr. Tregear was let off, as although the jury found him guilty the Recorder on further consideration thought there was no legal offence." The Recorder disclaimed that, and disclaimed it with great emphasis, and Park J., when Mr. Carlile had told the jury this, thought it right to correct the mistake which Mr. Carlile had made. I do not know that he means to say that he approves of the Recorder's law, but if he does there is a distinction between that case and the case of *Rex* v. *Carlile* (1), because Park J. says this: "In the present case, one question is, whether this act of the defendant was at all necessary for the bona fide carrying on of his trade; for if it was, and he did not take up more time in the doing of it than was necessary, the law would do what it could to protect him. Now the defendant is so far from thinking that this exhibition is essential to the carrying on of his trade, that he has told us to-day, that he considers his trade to be injured by it." The decision in *Rex* v. *Carlile* (1) is to the effect that a man is responsible for collecting a crowd in front of his shop, by putting up some representation which is intended to make the crowd stop, and which will make the crowd stop, unless he has done it for the lawful purpose of carrying on his trade, and in the reasonable exercise of it. The summing up goes as far as that, but, in my opinion, it goes no further.

Now the case of *Walker* v. *Brewster* (2) is, I think, a distinct authority against the appellants, and in favour of the decision of the Court. There were three distinct grounds of complaint in *Walker* v. *Brewster* (2), and no doubt Wood V.-C., whose authority is very great, laid the greatest weight upon that which, in my humble opinion,—and I must speak my opinion—was the

(1) 6 C. & P. 636, 649.

(2) L. R. 5 Eq. 25.

weakest ground. He put to the forefront the collection of disorderly people whom the defendant did not wish to come there, but for whose coming he said he was responsible. To my mind it is a most extraordinary proposition that a man should be responsible for bringing people whom he does not want to bring; but no doubt Wood V.-C. did decide the case on that ground, and all that can be said about it is that there were ample other grounds upon the other points made in the case why the injunction should stand, and why nobody could have safely appealed from it, but it is otherwise a decision which does not bind us here, but which is no doubt a decision of a very eminent judge.

The case of *Inchbald* v. *Robinson* (1) to my mind has been misconceived by counsel for the plaintiffs and respondents. There was a case of *Inchbald* v. *Robinson* and a case of *Inchbald* v. *Barrington*. *Inchbald* v. *Barrington* succeeded on the ground of noise; *Inchbald* v. *Robinson* failed on the ground that there was no noise proved and no nuisance from the crowd such as the Court would restrain. It came first of all before Lord Cairns on appeal from Malins V.-C. on a motion. His Lordship dissolved the injunction; that was his decision. In the course of dissolving it he said that he was far from satisfied that any case of nuisance, as that term was understood at law, could be maintained by the plaintiff. He then proceeded, rather obiter, to say that which, however, again I do not think anybody could criticize: " There were, no doubt, many authorities to the effect that noise in the immediate proximity of a residence might become a nuisance, and might be abated as such; there were authorities to shew that the collecting of crowds immediately before a residence, so as to block up the approaches to it, might be a nuisance,"—so it might if the collecting is done in certain ways and for certain purposes—" and that if the collection of those crowds was to be attributed to the action of a particular individual, that individual might be restrained from the commission of that act. His Lordship, however, said that the evidence, which might be very different at the hearing, failed entirely to satisfy him as it then stood, that the noise of the performance was such that it would occasion a nuisance to a house so far off as that of the plaintiff, or that there was any collection of crowds to such an extent as to block up the thoroughfare or occasion a nuisance to the plaintiff." Assuming the plaintiff's law, and certainly not at the moment thinking of questioning it, Lord Cairns thought that the facts did not bring it up to that law. Now when it came to the Court of Appeal I think the first sentence of Selwyn L.J.'s judgment should not be read without the second or third: "We can now dispose of both these appeals, which stand on very different grounds. A number of cases have been referred to, but the law applicable to the subject is now well settled, and has been clearly laid down by Lord Cairns in the present case." What was the law which Selwyn L.J. thought Lord Cairns had laid down? It follows in the next sentence: "The Court cannot enter into such a question as whether a circus at a particular distance from a house must be a nuisance, nor, when a circus has been erected, is the Court bound to have it tried at law whether it is a nuisance." That was one of the points raised. "The Court may, if it thinks fit, send the question of nuisance to be tried by a jury, but it is not bound to do so, and if the evidence is clear, the duty of the Court is to dispose of the case at once." That appears to have been the law as laid down by Lord Cairns, of which Selwyn L.J. approved. Then he comes to deal with some of the authorities. "The case of *Rex* v. *Moore* (1) was pressed upon us, but the circumstances there were entirely different; this is a case of an indoor performance, that was a case where pigeon shooting took place in the open air, and crowds of people assembled outside the inclosure to shoot at the stray pigeons." Then he no doubt seems to accept *Walker* v. *Brewster* (2), at least he seems to distinguish it. "*Walker* v. *Brewster* (2), which was much relied on, was also a case of outdoor performance, where people would assemble outside the ground, since the fireworks could be seen and the band heard almost as well outside the ground as within it." I agree that he does not seem to dispute the law as laid down in *Walker* v. *Brewster* (2), he distinguishes it. Giffard L.J.

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(1) L. R. 4 Ch. 388, 394, 395.

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(1) 3 B. & Ad. 184.

(2) L. R. 5 Eq. 25.

says this (1): "The whole of the case made by the bill is, that the circus will draw together a great crowd of disorderly persons. The evidence in support of this allegation is insufficient, and if an injunction in such a case were to be granted and upheld, it would prevent the setting up near a dwelling-house any exhibition likely to be attended by a large number of people." That sentence seems to me to be a sentence of some importance.

Now comes *Barber* v. *Penley* (2), which is certainly a case in point. I am afraid I must say that I disagree with *Barber* v. *Penley* (2), and I do not agree with some of the observations which the appellants' counsel have made. I think North J. intended to say, and did say, that, in his opinion, what was done in that case by the proprietors of the Globe Theatre was an actionable nuisance, and would support an injunction. I think he was to a considerable extent induced by a not sufficiently accurate examination (if I may say so) of the old cases such as *Rex* v. *Moore* (3) and *Betterton's Case* (4), all of which he seems to refer to without very much analysis. But there is one thing to be said about *Barber* v. *Penley* (2), North J. hardly had the courage of his opinions. I know he says that it is not necessary now to grant an injunction, and I know he says, and puts it in his order, that the plaintiff admitted that there was no nuisance; but I do not think one should forget why there was no nuisance. He says: "In the first place I do not think it necessary; no injunction is wanted now, because, as the plaintiff's own affidavit, to which I have just referred, says, the nuisance has been put a stop to." Good. Why and how? "The police have taken the matter in hand, and there is no reason whatever to anticipate that they will not duly perform their duties and prevent any nuisance arising." Apparently the police can in these cases prevent a nuisance; and as that is so, is not the real remedy to go to the police to prevent a nuisance?

The case of *Wagstaff* v. *Edison Bell Phonograph Corporation* (5) is another very strong decision, and amounts to this, that one trader may not make his shop window, which is, after all, the most important element in the business of a shopkeeper in the metropolis, so attractive as to bring crowds round it in such a way as to interfere with the people having the easiest and most direct and commodious access to the next shop. I am sorry to say that I entirely disagree with that principle. I believe that every trader has a right to make his shop window as attractive as possible, and that he is not responsible for crowds assembling to gaze at that shop window, and that it is for the police to regulate the traffic and to make those persons, when they stand longer than they have any right to stand on the highway, move on. If that be the case with regard to attractions which require people at the moment to stop, it is a fortiori the case when the attraction is in the future, when the people are not invited to be there and stop at all, but are only invited to come at a particular hour, and, in order that they may themselves be certain to get access at that hour, come beforehand and hang about.

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(1) L. R. 4 Ch. 397.

(2) [1893] 2 Ch. 447, 460.

(3) 3 B. & Ad. 184.

(4) Holt, 538; 5 Mod. 142; Skin. 625.

(5) 10 Times L. R. 80.

In my opinion—I am sorry to have expressed it at considerable length, but in my view this is a serious case and there is much to travel over—there was no actionable nuisance in this case at all, and the defendants ought not to have been put upon any undertaking, and ought not to have been made to pay the costs of the action, and this appeal ought to have succeeded; but as the majority of the Court are of the opposite opinion, it will be dismissed with costs.

Solicitors: *Beaumont, Son & Rigden, for Maples & McCraith, Nottingham; Chamberlain, Johnson & Levy.*

R. M.

C. A.

1913

EVE J.

May 30;
June 4.

C. A.

Dec. 12, 15.

In re GARDOM.

LE PAGE *v.* ATTORNEY-GENERAL.

[1912 G. 3502.]

Will—Construction—Charitable Trust—"Residence for ladies of limited means"—Trustees to expend Residue "as they know to be most in agreement with my desires"—Parol Evidence—Sufficiency—Secret Trust—Communication to one of two Trustees—Trustee a Beneficiary.

By her will, made in March, 1900, a testatrix, who died in 1911, devised and bequeathed her real and personal estate to the plaintiffs, Dr. Le P. and his daughter W. Le P., upon trust to sell and convert into money such portions as should be necessary upon trust for the maintenance of a temporary house of residence for ladies of limited means; if, at any time, such house should be considered unnecessary the money thus set apart was to be distributed by the trustees in yearly payments to such ladies as they might consider worthy of such assistance. The testatrix then appointed Dr. Le P. and W. Le P. executors of her will, and directed that they should "expend all or any of the residue of my estate in such manner as they know to be most in agreement with my desires."

By a codicil made in 1903 the testatrix confirmed her will.

It was proved by the evidence of Dr. Le P. that in 1886 the testatrix had told him that she intended to provide for his three children; that on various occasions she said she would make her will and leave all to them; and that in March, 1900, she handed him a duplicate of her will asking him to keep it, saying "I have told you many times I was going to make my will, and that I would leave all to your dear girls."

This last statement was made to Dr. Le P. before or contemporaneously with the execution of the will, and he accepted the trust, but the statements as to the intentions of the testatrix were not made to W. Le P. prior to the date of the will.

On a summons taken out by the trustees, to which the Attorney-General and the next of kin of the testatrix and the two other daughters of Dr. Le P. were respondents:—

Held by Eve J.: (i.) That the primary trust in the will was a good charitable trust of so much of the estate as might be necessary for the maintenance of the house, and the subsequent alternative bequests did not render it void for uncertainty.

(ii.) That inasmuch as the trust as to the residue appeared on the face of the will, parol evidence was admissible to prove the particular manner in which the testatrix desired the residue to be disposed of; that she had communicated her determination to the plaintiffs at or before the making of the will; and that the plaintiffs had accepted the trust.

(iii.) That, on the evidence, the communications to Dr. Le P. were sufficient to impress the estate with a trust in favour of his three daughters, and there was no necessity for the communication of the trust to be made to and accepted by both the trustees.

Held, therefore, that the ultimate residue was to be held by the trustees upon trust for the three daughters of Dr. Le P., and not for the next of kin of the testatrix.

Held by the Court of Appeal (reversing the decision of Eve J. on this point), that the plaintiffs had failed to establish by their evidence the existence of the trust.

ADJOURNED SUMMONS.

By her will, dated March 8, 1900, Eliza Augusta Gardom, of Heber Cottage, Baguley, in the county of Chester, after bequeathing to her brother, George Frederick Gardom, 100*l.* free of legacy duty, and to her sister, the defendant Sarah Emily Gardom, 200*l.* free of legacy duty, devised and bequeathed all the real estate and the residue of the personal estate and effects whatsoever and wheresoever of which she should be possessed, or over which she should have any power of appointment or disposition at the time of her decease (subject to the payment of debts and funeral and testamentary expenses), unto her old and valued friends the plaintiffs, John Fisher Le Page and his daughter Winifred Maud D'Estelle Le Page, to sell and convert into money such portions thereof as should be necessary or desirable in their discretion, " upon trust for the maintenance of a temporary house of residence for ladies of limited means." If, at any time, such house or home should in their discretion be considered unnecessary, the testatrix authorized her said trustees to distribute the money thus set apart in yearly payments to such ladies as they in their judgment might consider worthy of such assistance, not being Roman Catholics, no separate donation exceeding 20*l.* being made to any one lady. And the testatrix appointed the said John Fisher Le Page and Winifred Maud D'Estelle Le Page executors of her will, and directed that her said trustees and executors should " expend all or any of the residue of my estate in such manner as they know to be most in agreement with my desires."

By a codicil to her will dated June 25, 1903, the testatrix revoked the legacy of 100*l.* given to her brother, and gave to John Fisher Le Page absolutely a property known as Heber Cottage, Baguley,

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and four acres of land, and certain effects, and in all other respects she confirmed her said will.

The testatrix died on March 12, 1911, and her will and codicil were duly proved by the executors thereof. At the date of the death of the testatrix the defendant Sarah Emily Gardom was her sole next of kin. After payment of debts, funeral and testamentary expenses, and the legacy of 200*l.*, there remained in the hands of the executors investments and cash amounting to 9500*l.*

An originating summons was taken out by the plaintiffs, Dr. Le Page and Winifred Le Page, asking whether there was a good charitable trust for the maintenance of a house of residence for ladies of limited means, and whether the residuary estate of the testatrix was held on trust for the next of kin or for some other and what objects.

The respondents were the Attorney-General, Sarah Emily Gardom, and Florence Bertha Louise de Wilton Le Page and Ethel Mabel Beatrice De Jersey Le Page (the two other daughters of Dr. Le Page), who were afterwards added as defendants.

The evidence chiefly relied upon in favour of the three daughters of Dr. Le Page taking under the gift of residue was that of Dr. Le Page. In paragraph 9 of his affidavit he stated as follows: "On January 8th, 1886, I met with a very serious accident which totally incapacitated me for work for over six months. I went to Switzerland for my health, and on my return in the following July the testatrix Eliza Augusta Gardom, who had taken charge of my household during my enforced long absence with my wife, was much distressed at the slight improvement made in my condition, and also at the extent to which my practice had suffered, and before she returned to her home she asked me not to trouble about anything and told me that she intended in any case to provide for my three children, to whom she was very much attached. On various occasions she said she would make her will, and would leave all to them. In March, 1900, she handed a duplicate of her will now produced to me and marked A, and asked me to keep this in my possession in case anything happened to the will, and said in these words, or in words practically identical with these words, 'I have told you many times I was going to make my will, and that I would leave all to your dear girls.' She said that she had left to her sister 200*l.*, and to her brother 100*l.*, and that she wished us (her executors) to put aside for the home whatever we thought desirable, to pay the two legacies, 'and pay all I owe, and I give your girls all the rest.'"

The effect of the further evidence and correspondence sufficiently appears from the judgment of Eve J. The learned judge found that there was no communication by the testatrix before the date of her will to Winifred Le Page of her desires with regard to the ultimate residue.

The summons came on for hearing before Eve J. on May 30, 1913.

P. O. Lawrence, K.C., and *A. G. Roby*, for the plaintiffs. The plaintiffs desire to uphold the will so far as the charitable bequest is concerned, and will submit a scheme. Subject to that, they maintain that there is a trust to them for the three daughters of Dr. Le Page in equal shares.

When a trust appears on the face of a will parol evidence may be admitted of a secret trust: *In re Fleetwood.* (1) In the present case the declarations of the testatrix to Dr. Le Page were made either before or contemporaneously with the making of the will, and are therefore admissible. The will was also confirmed in 1903.

The only question is whether there was a definite trust established for the three daughters. We submit there was on the authorities: *In re Huxtable* (2); *In re Hetley* (3); *In re Boyes.* (4)

The trust of the residence for ladies of limited means—that is reduced, restricted means—is a good charitable trust. Absolute poverty is not required: *Trustees of the Mary Clark Home* v. *Anderson.* (5)

H. A. Hind, for the other two daughters of Dr. Le Page, who had been added as parties.

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(1) (1880) 15 Ch. D. 594.

(2) [1902] 1 Ch. 214; [1902] 2 Ch. 793.

(3) [1902] 2 Ch. 866.

(4) (1884) 26 Ch. D. 531.

(5) [1904] 2 K. B. 645; 5 Tax Cases, 48.

Clayton, K.C., and *G. B. Hertz*, for the defendant Sarah E. Gardom. The defendant, as sole next of kin, is entitled under this will. The trustees hold the residue of the personal estate for her. The gift for the benefit of ladies of limited means is not necessarily charitable. A charitable gift must be for the relief of poverty: *Attorney-General* v. *Duke of Northumberland.* (1) It is also of an indefinite amount; the subsequent alternative gifts in the discretion of the trustees are not charitable, and the whole gift is void for uncertainty. Further, the ultimate gift of the residue is too indefinite for the Court to give effect to it: *In re Macduff* (2); *Grimond* v. *Grimond* (3); *In re Sidney.* (4) The defendant therefore takes the residue beneficially. The trust is to "expend" all or any of the residue in such manner as the trustees know to be most in agreement with the testatrix's desires. The term "expend" is not a suitable one for a direction to divide the residue among three persons, one of whom is herself a trustee. Before an oral trust such as this can be established it must be consistent with the terms of the will, and must have been communicated to the trustees at or before the execution of the will. Here it was admittedly only communicated to Dr. Le Page, and there is nothing to shew that it was before the execution of the will. The onus is on the plaintiffs: *Norris* v. *Frazer.* (5) Where a trust is intended the trustee cannot take beneficially: *Briggs* v. *Penny* (6); *Johnson* v. *Ball* (7); *Irvine* v. *Sullivan* (8); *Scott* v. *Brownrigg* (9); *Balfe* v. *Halpenny.* (10)

Austen-Cartmell, for the Attorney-General. It is said first that this is not a charitable trust, and secondly that it is too vague to be enforced. Taking the second point first, the paramount trust for charity is good—Tudor on Charities and Mortmain, 4th ed. pp. 92, 93—and the subject-matter of the trust is ascertainable: *Adnam* v. *Cole.* (11) The cases cited on behalf of the next of kin on this point have no application. Where part of a trust fund is given to a charity and part to objects which are not charitable, the intention to devote to charity is established: *Hunter* v. *Attorney-General.* (1) As to whether the bequest for the benefit of ladies of limited means is a charity, the case of *Trustees of the Mary Clark Home* v. *Anderson* (2) directly applies to the present case. It is not necessary that the ladies should be absolutely destitute: *In re Estlin.* (3)

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(1) (1877) 7 Ch. D. 745, 749.
(2) [1896] 2 Ch. 451.
(3) [1905] A. C. 124.
(4) [1908] 1 Ch. 126.
(5) (1873) L. R. 15 Eq. 318.
(6) (1851) 3 Mac. & G. 546.
(7) (1851) 5 De G. & Sm. 85.
(8) (1869) L. R. 8 Eq. 673.
(9) (1881) 9 L. R. Ir. 246.
(10) [1904] 1 I. R. 486.
(11) (1843) 6 Beav. 353.

P. O. Lawrence, K.C., in reply. Communication to one trustee is sufficient to prevent the trust being defeated. The will having been confirmed, it takes effect as if executed at the date of the codicil, so that the trust was communicated and accepted before the date of the codicil. But even if not, there is no authority to say it is ineffectual where there is a trust disclosed on the face of the will: *In re Boyes.* (4)

EVE J. Two distinct questions of construction arise on the will of the testatrix, the one, whether the trust for the maintenance of a temporary house of residence for ladies of limited means is a good charitable trust, and the other, whether the residuary estate, which is all personalty, is held upon trust for the next of kin of the testatrix or for some other and what objects. Prima facie, the institution referred to by the testatrix would appear to be of a charitable nature. It is not contemplated that it will be self-supporting, and the obvious intention of the testatrix is that her money is to be used for the purpose of providing a temporary home for ladies whose means are too restricted to permit of their providing or enjoying unassisted the advantages of such a home. The validity of the bequest as a good charitable trust is challenged upon two grounds, the one that the object is not in fact charity, and the other that, even if it be so, the subsequent bequests in the will, the one in the nature of an alternative bequest, if the house is considered unnecessary, and the other the bequest of the residue, introduce alternative objects which may or may not be charitable, and that the whole disposition is thereby rendered void for uncertainty. I do not think either of these contentions has been established. It is true

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(1) [1899] A. C. 309.

(2) [1904] 2 K. B. 645.

(3) (1903) 89 L. T. 88.

(4) 26 Ch. D. 531.

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that ladies of limited means are not destitute, and that the expression "limited means" may vary in its signification according to the standard by which the means are measured, but these arguments provoke the rejoinder that there are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless, and further that in this case the limitation of means contemplated is presumably a limitation such as will necessitate some contribution from the bounty of the testatrix before the recipient would be able to defray the expense of a temporary sojourn in the home. In other words the objects to be benefited by the bequest are ladies too poor to provide themselves with a temporary home without outside assistance. I think it is a good charitable trust and am fortified in this view by some observations of Channell J. in the case of *Trustees of the Mary Clark Home* v. *Anderson.* (1) He says: "I do not know any standard of poverty, nor how I can lay down any rule; the only thing to guide me is this: these ladies go to the institution for the sole reason that they are poor, and the institution is absolutely charitable." I think those words apply exactly to the section of the public and to the institution which the testatrix here intended to benefit and to subsidize.

The argument on uncertainty overlooks, I think, the terms of the bequest under which the primary trust is to appropriate so much of the residue as may be necessary for the maintenance of the charity. It is not a case where a discretion is given to the trustees to apply the fund to charitable or non-charitable objects; the necessities of the charity must first be provided for, and although the trustees have a discretion as to whether any further part of the estate is to be devoted to the charity they have no power to divert or apply any part of the estate to non-charitable objects until the amount necessary for the maintenance of the charity has been appropriated. In my opinion, therefore, there is a good charitable bequest of so much of the estate as may be necessary, and of such further portion as in the discretion of the trustees may be desirable, for the maintenance of the house or home.

I come now to consider the destination of the ultimate residue. It is clear that the plaintiffs do not take this beneficially. Are they trustees for the next of kin, or, as they allege and assert, for the three daughters of the first plaintiff, one of whom is his co-plaintiff? It is argued that if the will alone be looked at the beneficiaries are the next of kin, and that the parol evidence of a trust for other objects than the next of kin fails to establish any such trust, and so far as it goes to establish a trust for the three daughters of Dr. Le Page is not consistent with the terms of the will. The admissibility of parol evidence in a case like the present, where a trust appears on the face of the will, is justified by the judgment of Hall V.-C. in *In re Fleetwood* (1), and I think as the result of that judgment and of the numerous other authorities to which my attention has been drawn it may be stated that the parol evidence, in order to establish the trust, must at least prove three things: first, that the testatrix at the time of making her will had determined the particular manner in which the residue was to be disposed of; secondly, that she had communicated her determination to the plaintiffs at or before the making of the will; and thirdly, that the plaintiffs either avowedly, or by some other means, have accepted the trust. How have these matters been established by the evidence in this case? The direction of the testatrix in her will is that her "said trustees and executors shall expend all or any of the residue of my estate in such manner as they know to be most in agreement with my desires." That direction does, in my opinion, point to a disposition then already determined upon; the expression is not an apt expression to describe a condition of things where the testatrix was reserving a right of indicating subsequently the destination of her property. I think, therefore, on the face of the will there is that from which I ought to draw the conclusion that the testatrix had then already determined the destination of her residuary estate and had, as she thought, made known her decision to the persons nominated as her executors and trustees.

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(1) [1904] 2 K. B. 656.

The next question is what was the disposition upon which the testatrix had then already determined? This is the point upon which I find considerable difficulty in coming to a conclusion. There is a considerable amount of evidence of statements

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(1) 15 Ch. D. 594.

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made by the testatrix at dates subsequent to the making of her will, but in answering the question I have just propounded I must disregard these and, as far as possible, put myself in the position of the testatrix at the date of her will. For this purpose the only affidavit which I can safely rely upon as proving or going to prove the intention of the testatrix at that date is that of Dr. Le Page. I do not in the least discredit the affidavits of his daughters, but I think it is obvious that they are in the main speaking generally of the attitude of the testatrix towards them, and more particularly during the last decade of her life and after the date of her will. Dr. Le Page on the other hand in paragraph 9 of his affidavit deals more or less chronologically with material matters from the early part of 1886, fourteen years before the will, down to a date immediately after its execution. [His Lordship read the first portion of paragraph 9 of the affidavit and continued.] There is no evidence inconsistent with that being the attitude of the testatrix. It is true that a letter from the testatrix to her sister has been produced from which it would appear that she was contemplating the possibility of some contribution being made from her property after her death to some charitable scheme which had rather attracted her, but that letter was written in 1901, and I only mention it in order to shew that I have not overlooked it, for it of course is in no way inconsistent with Dr. Le Page's statement that from 1886 onwards and down to the date of her will the intention of the testatrix was to provide for his daughters. In the evidence before me there is nothing to contradict and nothing inconsistent with these statements of Dr. Le Page. On the contrary there is a good deal which is consistent with them, for although I cannot, for the purpose of determining what was her intention at the date of her will, regard what the testatrix afterwards said, I think I can and ought to look at her subsequent conduct and statements for the purpose of considering how far they were consistent with the existence of such an intention as Dr. Le Page deposes to. The evidence is overwhelming that for many years before and right down to the time of her death the testatrix entertained and frequently expressed strong feelings of attachment to the doctor's daughters, and made many statements to them to the effect that her property would one day be theirs. The conclusion to which the evidence on this part of the case leads me is that the testatrix, when she made her will, and thereafter until her death, was intending that her estate should ultimately go to these young ladies.

The next question is to what extent did she communicate those intentions to the trustees. It is clear, I think, that she had communicated to Dr. Le Page her intention to benefit his daughters. Before considering what was the material communication made to him and the time when it was made, I pause to remark that, in my opinion, the evidence of the youngest daughter, who is co-plaintiff with Dr. Le Page, cannot be treated as establishing any communication to her of intention prior in date to the will. I agree with Mr. Clayton that the whole of her affidavit from paragraph 2 onwards deals with the last ten years of the testatrix's life, all subsequent to the date of the will, and I cannot hold that there was any communication to this plaintiff, at or antecedent to the will, of the intentions of the testatrix. This brings me to the inquiry what was the communication made to the doctor, and when was it made. Counsel for the next of kin has argued that the mere statement, even though often reiterated, that she intended to leave her estate to the daughters, or that she intended them to have her property, would not amount to a declaration of trust in favour of the daughters. I agree, and therefore it is that I have to examine with care and ascertain whether the communications to which the doctor deposes were merely the reiterated expressions of a benevolent intention, or amounted to a definite communication to him of the fact that the trust upon which he was to hold the residue was one for the benefit of his children. Let us see what Dr. Le Page says in his affidavit after the passages I have already read, bearing in mind that the will is dated March 8, 1900. He says: [His Lordship read the further part of the affidavit beginning "In March, 1900," and continued.] What was the effect of that statement coupled with the handing to the doctor of a document which was in fact a duplicate will, for it was executed and properly attested as a will, and coupled also with the reference to the statements which from July, 1886, she had been frequently making? Was it not a communication to the doctor of the fact that she had then done, or was doing, an act by which she intended to secure through his agency the fulfilment of her intentions? I think it was, and that I ought to treat this communication as sufficient to impress the estate with a trust in favour of the doctor's daughters. Moreover, I think that the circumstances in which the communication was made, accompanied as it was by the handing over of the duplicate will, compel me to treat it as being for all practical purposes contemporaneous with the making of the will. Before leaving this part of the case I should like to add that the affidavits not only bear upon the face of them the imprint of truth, but appear to have been prepared with a view to stating only what is actually remembered by the deponents, and not to suggesting inferences to be drawn therefrom. There was, therefore, a communication to the doctor of the trust and an acceptance by him by conduct, if not by express statement. But there was no similar communication to his co-trustee and co-plaintiff, and it is argued that in order to create an effective trust the evidence must establish its communication to, and its acceptance by, both trustees. I speak with diffidence, because my doubts must be due to some failure on my part to appreciate the exact bearing of the point, but I do not understand the grounds upon which, in cases where, on the face of the will, a trust is disclosed, communication of the trust to the trustee has been held to be an essential element of its creation. Where there is nothing in the will disclosing any trust, one can appreciate why communication of the trust to and its acceptance by the legatee is essential, but the considerations applicable to a case where the legatee takes beneficially under the will, and is only converted into a trustee by reason of the trust being disclosed to and accepted by him, do not, I should have thought, in any way apply to a case where it is made clear on the face of the will that he is to take as trustee and not beneficially. In the last-mentioned cases the problem is to find out what is the trust, not whether there is a trust at all, and, speaking for myself, I do not see why a communication to the trustee should be an essential element in the solution of the problem, or, indeed, of any greater value than a communication made to any other person, and of course properly proved. But *In re Fleetwood* (1) and the other authorities appear to have established that there must be a communication to the trustee, and I must accept that position. Still, I am not disposed to extend the doctrine, or to be the first to hold that where, as in this case, the existence of a trust is disclosed on the face of the will, it must be proved that the nature of the trust was communicated to all the trustees before it can be held to be established. I cannot bring myself to think that in a case like the present, where I have a particular trust proved to have been communicated to and accepted by one of two trustees, I am bound to disregard that evidence, and declare the estate to be held upon another trust, simply because the other trustee was not informed of the particular trust. One further matter I have to deal with, and that is the alleged inconsistency between the terms of the residuary bequest in the will and the trust which I hold to have been established. A great deal of criticism has been levelled at the expression "I direct that my trustees shall expend the residue." It is said, and I think with some force, that this is not the sort of expression one would have chosen if one had intended the residue to be divided amongst three persons, one of whom is herself one of the trustees. I think the language used is open to that criticism, but referring again to Dr. Le Page's affidavit, I read his statement in the concluding words of paragraph 9 of what the testatrix said to him when she handed him the duplicate will. "She said that no one need know and no one should know who she had left her money to. It is no one's business"; and a little lower down he adds, "The testatrix never informed me who had prepared her will, nor do I know who did this." I think it is a fair and natural inference that the testatrix did not inform the draftsman of her will of the destination of her residuary estate, and that in these circumstances he adopted language wide enough to include almost any scheme of distribution. Some point also was made of the fact that many years after the date of this will the testatrix wrote a letter of instructions to Dr. Le Page providing for certain small sums which she desired to be given after her death to friends and dependants,

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and it was suggested that the writing of such a letter and its contents, more particularly the words with which it concludes, are inconsistent with the existence of a trust. The trust was a trust of the residue, and there is nothing inconsistent with such a trust in subsequent gifts of legacies or annuities. The result is that I hold that this residue is held on trust for the three daughters of Dr. Le Page as tenants in common, and not for the next of kin. The costs must be taxed and paid out of the residue. The difficulty is one for which the testatrix is alone responsible, and it would be unfair that I should visit the respondent Miss Gardom with any of the costs. She has only done her duty in raising the several points which have been argued.

G. M.

C. A.

The defendant Sarah E. Gardom appealed on the ground that, on the construction of the will and in the events which had happened, a valid trust had not been established. The appeal came on for hearing on December 12, 1913.

Clayton, K.C., and *G. B. Hertz*, for the appellant; *P. O. Lawrence, K.C.*, and *A. G. Roby*, for the plaintiffs; and *H. A. Hind*, for other parties, made use of the same arguments as in the Court below.

COZENS-HARDY M.R. This is an appeal which at one time I thought might raise some curious points of law, but in my opinion there is not any point of law involved in the case, for the respondents in my view fail in point of evidence. [His Lordship stated the effect of the will and the evidence, and continued:] That being so, I think the appeal must be allowed on the short ground that these ladies have not in point of evidence established the trust which they are seeking to enforce.

SWINFEN EADY L.J. I am of the same opinion, although I fear that the conclusion at which I have arrived may be to deprive these ladies of something which the testatrix really intended that they should have. After listening to the very able argument it does not appear to me that any question of law arises in the case. Where a gift of personalty is made to a person upon trust to deal with it in a particular manner or to apply it for a particular purpose although communicated to the legatee, that manner or purpose if communicated before the date of the will may be established by parol evidence, and if valid, effect will be given to it. The authorities are summed up in the case of *In re Fleetwood* (1) to which we have been referred. The real difficulty of the respondents in the present case is that they have failed to establish the trusts. [His Lordship analysed the evidence, which he agreed with the Master of the Rolls in accepting implicitly, and continued :] On these grounds I think that the respondents have failed to establish that the trust is for the three daughters.

PHILLIMORE L.J. I am of the same opinion. The other members of the Court have so closely expressed what I desire to say that, except for the fact that we are differing from the judgment of the Court below, I should say nothing. I consider this to be a mere inquiry whether there is a sufficiently ascertained trust. I accept for the purpose of this argument the contention of Mr. Lawrence that if there is a legacy upon trust, and if the trust can be ascertained in any manner, communications to the trustees or either of them may be unnecessary. I am prepared for the purposes of this case to go that length. Then I have to discover whether or not there is any real ascertained trust on which this money has been left. If there is not it must by operation of law go to the next of kin. [After stating the result of the evidence, which he considered insufficient, his Lordship added :] For these reasons I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Tatham & Lousada, for Farrar & Co., Manchester; Solicitor to the Treasury; Vaudrey, Oppenheim & Mellor, Manchester.*

H. C. R.

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(1) 15 Ch. D. 594.

EVE J.

1914

Feb. 11.

In re BEAUCHAMP'S WILL TRUSTS.
CADGE *v.* BARKER-HAHLO.

[1913 B. 2522.]

Settled Land—Tenant for Life—Person having the Powers of a Tenant for Life—Trustees of Fee Simple—Trust to accumulate Rents for Twenty-one Years—" Upon the expiration of the said period" upon Trust for Daughter for Life—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 58, *sub-s.* 1, *cl.* (*vi.*)—*Accumulations Act,* 1892 (55 *&* 56 *Vict. c.* 58), *s.* 1.

A testator by his will devised his capital mansion house and the whole of his real estates to his trustees in fee simple, upon trust to permit his daughter during her life to have the personal use or occupation of the mansion house free from rent, rates and taxes, and any liability for repair and upkeep, and he directed his trustees to stand possessed of all his hereditaments and premises (subject to the trust in favour of his daughter) upon trust to let and manage the same for twenty-one years after his death, and, after the payment of all outgoings, to accumulate the balance of the rents and profits, and apply them as therein mentioned, and upon the expiration of the period of twenty-one years, and subject to the trusts of the mansion house in favour of his daughter, the testator directed that the whole of the devised hereditaments should be held upon trust for his eldest daughter for life, with remainder to her first-born son for life, with remainders over. Upon the death of the testator in 1912 questions arose, inter alia, as to the position of the daughter under the will. It was not disputed that she was tenant for life of the mansion house, but it was objected that she had not the powers of a tenant for life of the rest of the real estate :—

Held, following the decision in *In re Llewellyn* [1911] 1 Ch. 451, that the daughter had the powers of a tenant for life in respect of the testator's residuary estate under the Settled Land Act, 1882, s. 58, sub-s. 1, cl. (vi.).

In re Martyn (1900) 69 L. J. (Ch.) 733 observed upon.

ADJOURNED SUMMONS.

By his will, dated December 6, 1909, Sir Reginald William Proctor Beauchamp, of Langley Park, in the county of Norfolk, Baronet, appointed Edward Cadge and Edward George Cubitt to be the executors and trustees thereof, and also trustees for the purposes of the Settled Land Acts, 1882 to 1890. By clause 2 of his will the testator devised his capital messuage or mansion house Langley Park, but sometimes called Langley Hall, in the county of Norfolk, and all his manors, advowsons, freehold messuages, lands, and hereditaments constituting the Langley estate in the same county, and all other his messuages, lands, and hereditaments situate in the same county or elsewhere, unto and to the use of his trustees, their heirs and assigns (charged with certain annuities), upon trust (clause 3) to permit his eldest daughter, the defendant Sheila Ginevra Hilda Mary Barker-Hahlo, "during her life to have the personal use or occupation and enjoyment, free from rent, rates, and taxes, and also free from any liability for repair and upkeep, of my mansion house Langley Hall, together with the stables, coachhouses, and gardens attached thereto, and the furniture and effects of domestic use and ornament in the said mansion house." By clause 4 the trustees were directed to stand possessed of all the hereditaments and premises thereinbefore devised (subject to the trust in favour of Mrs. Barker-Hahlo) upon trust to let, manage, or superintend the management of the same for a period of twenty-one years after his death, and out of the net rents, profits, and income thereof to pay all outgoings in connection with the said premises and all expenses incurred in connection with the management of the same (including any salary they might think proper to pay to the plaintiff Edward George Cubitt, and including the cost of maintaining and keeping in repair and insuring the said mansion house, with the stables and outbuildings attached thereto, and the furniture and effects, and of keeping up and cultivating the gardens), and to accumulate by way of compound interest, during the period of twenty-one years, the balance from time to time of the said rents, profits, and income, by investing the same as therein mentioned, with power to vary such investments, and to apply such accumulations as therein mentioned, and after the expiration of twenty-one years to hold the balance (if any) of such accumulations upon trust to invest the same in the purchase of freehold or copyhold hereditaments to be settled to the same uses as the said hereditaments thereby devised. By clause 5 large and varied powers of management were given to the trustees during the period of twenty-one years, and (by clause 6) upon the expiration of the said period of twenty-one years, and subject to the trusts declared of the mansion house and premises in favour of his eldest daughter, the testator directed that the whole of the devised hereditaments and premises should be held upon trust for his eldest daughter, Mrs. Barker-Hahlo, for her life, without impeachment of waste, for her separate use, without power of anticipation, and after her death in trust for her first-born son, if born in the testator's lifetime (which happened), for a protected life estate, with remainder to his first and other sons in tail male with divers remainders over. Under clause 19 of his will the testator confirmed a covenant entered into by him with the trustees of Mrs. Barker-Hahlo's marriage settlement to pay an annuity of 200*l*. a year for her benefit during the joint lives of herself and her husband, and charged the same on the hereditaments and premises settled by his will. By clause 21 he gave a further annuity of 100*l*. a year to Mrs. Barker-Hahlo.

By a codicil to his will dated May 24, 1911, the testator modified clause 4 of his will, and declared that the accumulations should not be applicable for investment in the purchase of real estate after such earlier date (if any) as from which accumulations for that purpose would be illegal under 55 & 56 Vict. c. 58, but the balance of accumulations (if any) made up to such earlier date should be dealt with as provided by the will, and during the residue of the period of twenty-one years the rents and profits should continue to be accumulated and invested as personal estate, and at the end of the period of twenty-one years should be held upon trust as therein mentioned.

The testator died on November 10, 1912, and his will and codicil were duly proved by the executors thereof on June 16, 1913.

Mrs. Barker-Hahlo resided with her husband at Camerton Court, Somerset. Langley Hall was a large mansion house standing in a park of 400 acres and containing eleven reception rooms and thirty-five bedrooms, with valuable furniture, pictures, and objects of art.

Numerous questions arose upon the construction of this will, and the plaintiffs took out an originating summons, to which Mrs. Barker-Hahlo and her infant son, Jocelyn George Reginald Barker-Hahlo, were respondents, asking, inter alia, whether, on the true construction of the will, the defendant Mrs. Barker-Hahlo was (*a*) a person having the powers of a tenant for life of the whole of the testator's real estates, under s. 58, sub-s. 1, cl. (vi.), of the Settled Land Act, 1882, or (*b*) was tenant for life, or a person having the powers of a tenant for life, under the said Act, of the mansion house, stabling, coachhouses, and gardens only.

It was admitted that Mrs. Barker-Hahlo was tenant for life of the mansion house, and the question was argued as to the rest of the real estate.

Maugham, K.C., and *Underhill*, for the trustees of the will, submitted the question as to whether Mrs. Barker-Hahlo had the powers of a tenant for life over the rest of the real property.

Clayton, K.C., and *J. W. Manning*, for Mrs. Barker-Hahlo. The legal estate is in the trustees, but Mrs. Barker-Hahlo, under the authorities, is a person having the powers of a tenant for life over the rest of the real estate. In the case of *In re Strangways* (1), which is distinguishable from the present, the interest was purely executory—an estate or interest in futuro—and did not arise at all until after the expiration of the term of twenty years. There was, in fact, no disposable interest, and it was held that the testator's son, not having any estate or interest in possession until after the determination of the term, had not during its continuance the powers of a tenant for life under the Settled Land Act.

A similar case to the present is that of *In re Martyn* (2), where the term of twenty-one years preceded the life interest as here. That case was followed in the case of *In re Llewellyn* (3), before Joyce J., and he also followed the Irish case of *Annesley* v. *Woodhouse*. (4) Having regard to the codicil, the accumulations are lawful.

Jessel, K.C., and *Dighton Pollock*, for the infant defendant. We submit that there is no beneficial interest in the residuary estate conferred upon Mrs. Barker-Hahlo for twenty-one years. She takes no estate till after the determination of that period. She has no estate or interest in possession of these lands within the meaning of s. 58, sub-s. 1, of the Settled Land Act, and cl. (vi.) of that sub-section does not apply. The case is governed by *In re Strangways.* (1)

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(1) (1886) 34 Ch. D. 423.

(2) 69 L. J. (Ch.) 733.

(3) [1911] 1 Ch. 451.

(4) [1898] 1 I. R. 69.

In *In re Martyn* (2) Kekewich J. gives a reason for the decision in *In re Strangways* (1) which that case does not warrant, namely, that the estate for life was created under an executory trust at the end of the term. That was not the fact. In the case of *In re Atkinson* (3) there was a discretionary trust to accumulate income, and the Court there held that the testator's son and his wife had not the powers of a tenant for life. *In re Llewellyn* (4) merely followed *In re Martyn* (2) and *Annesley* v. *Woodhouse* (5), an Irish case which was not really in point. In the present case the words of clause 6 of the will are very strong, "upon the expiration of the said period of twenty-one years." It is not an interest in the lady subject to the accumulation for a period of twenty-one years. It may be that where the words "subject thereto" are used, as in *In re Llewellyn* (4), the person is notionally tenant for life. But here there are no words of that sort. The lady is clearly tenant for life of the mansion house, but as to the rest of the realty she has no interest in possession until the twenty-one years have come to an end. The only inference to be drawn from the fact of her being made tenant for life of the house is that she is not to be tenant for life, or to have the powers of a tenant for life over the rest of the property.

Maugham, K.C. "Possession" in s. 58 of the Settled Land Act is used from the point of view of interest, not of actual possession. If the words "subject to" had been used it might have been different. The present case does not come within s. 58, and the Court will not extend the words of the section.

Clayton, K.C., in reply. It is wholly immaterial whether the lady takes a beneficial interest or not. There cannot be an estate in reversion or remainder unless there is a particular estate preceding. Here there is none; no term is created in this property antecedent to the life estate. The trustees are merely to receive the rents and accumulate.

(1) 34 Ch. D. 423.
(2) 69 L. J. (Ch.) 733.
(3) (1885) 30 Ch. D. 605.
(4) [1911] 1 Ch. 451.
(5) [1898] 1 I. R. 69.

EVE J.
1914
BEAUCHAMP'S WILL TRUSTS, *In re.*
CADGE *v.* BARKER-HAHLO.

Eve J. If I had to determine this case on the statute alone, and certainly if I had to determine it on the statute together with the decision in *In re Strangways* (1), I should feel bound to hold that Mrs. Barker-Hahlo was not a person having the powers of a tenant for life under s. 58, sub-s. 1, cl. (vi.), of the Act; but since that decision there have been two further decisions which, in my mind, create some difficulty. The first was that of *In re Martyn* (2), where the life interest was subject to a term the trusts of which exhausted the whole income. Kekewich J. held that the person who was tenant for life subject to the term had, during the term, the powers of a tenant for life. I think in that case, in view of Pearson J.'s judgment in *In re Atkinson* (3), there were weighty grounds for treating the estate as an estate in remainder, and had the matter rested there I might have felt myself entitled to construe this will in a way leading to a different conclusion than that arrived at in *In re Martyn.* (2) But it is, I think, difficult to distinguish the present case from that of *In re Llewellyn* (4), recently decided by Joyce J. It is true that the learned judge states that in deciding as he did he was following Kekewich J.'s decision in *In re Martyn* (2), but there are, I think, other statements in the judgment which go to shew that he did not proceed entirely upon the earlier decision.

In *In re Llewellyn* (4) the estates were devised to trustees upon trust, until an individual should attain a particular age, to accumulate the rents, and on his attaining that age to pay the rents to him. During the suspensory period the individual in question had an interest in the rents, capable, under a discretionary power vested in the trustees, of being increased, but that, as was pointed out, did not really affect the question which had to be decided. Here, as there, I have the estates devised to trustees upon trust, during a period of twenty-one years, to accumulate the rents, and then a clause which declares that upon the expiration of the period they are to be held upon trust for the testator's daughter for her life with remainders over. For all practical purposes the trusts of this will are identical with those in *In re Llewellyn* (4), and the mere fact that the life

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(1) 34 Ch. D. 423.
(2) 69 L. J. (Ch.) 733.
(3) 30 Ch. D. 605.
(4) [1911] 1 Ch. 451.

EVE J.
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BEAUCHAMP'S WILL TRUSTS, *In re.*
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estate of the lady in this case is not made in terms subject to the prior trust, as was the case in *In re Llewellyn* (1), cannot, in my opinion, differentiate the construction of the two wills. In principle Joyce J. has decided that where there is no term created and where there are successive trusts, of which the prior trust is a trust for accumulation, the person entitled to the life interest after the determination of the prior trust has, during the subsistence of the prior trust, the powers of a tenant for life under this sub-section. Whatever may have been the conclusion at which I should have arrived had the matter been free from authority, I think I am bound to follow Joyce J.'s judgment, and to hold that the daughter now has the powers of a tenant for life in respect of the testator's residuary realty.

Solicitors for all parties: *Collyer-Bristow, Curtis, Booth, Birks & Langley.*

G. M.

pplied. Re MARRYAT (*decd.*). [1948] All E.R. 796.

Followed. In re MARRYAT. [1948] 1 Ch. 298

Considered. Re SILVERSTON. [1949] 1 Ch. 270

Applied. Re SILVERSTON (*decd.*). [1949] 1 All E.R. 641.

EVE J.
1914
Feb. 18.

In re LAWSON.

WARDLEY *v.* BRINGLOE.

[1913 L. 1625.]

Will—Legacy—"Domestic Servant"—Meaning of "domestic"—Male Nurse—Temporary Suspension of Service.

By his will a testator, who died in April, 1912, bequeathed to each of his "domestic servants" who should have been in his service for two years prior to his decease the amount of one year's wages, free of duty. One of the claimants for this legacy was B, a certified male nurse and masseur, who was first engaged in 1907 by the receiver in lunacy of the testator's estate as an assistant attendant on the testator, at a weekly wage of a guinea. He did not sleep in the house, but took some of his meals there. From November, 1910, till the testator's death, with one break, he was engaged on night duty, twelve hours at a time, and at a salary of two guineas a week paid every fourth week. Owing to the strain of this attendance B. was obliged to take a holiday of four months in 1911 with the consent of the receiver, and received no salary during his absence. During his attendance he was free to undertake other work, and did so to a limited extent. On a summons by the executors of the testator to determine the question whether B. was entitled to the legacy:—

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(1) [1911] 1 Ch. 451.

Held that, on the true construction of the will, B. was a domestic servant, the term "domestic" being equivalent to "household."

Held, also, that although the service must be continuous for the period named, that did not involve service from day to day, and the suspension of the service, with the consent of the master, did not disentitle B. to the legacy claimed.

ADJOURNED SUMMONS.

By his will dated June 1, 1905, the testator, Joseph Henry Lawson, of Buxton, in the county of Derby, bequeathed, inter alia, "to each of my domestic servants who shall have been in my service for two years prior to my decease and shall not be under notice to leave whether given or received, the amount of one year's wages free of duty." The testator's wife died on February 21, 1907, and after her death the testator was found incapable of managing his own affairs. On July 4, 1907, William Fenwick Mill was appointed receiver of the estate under s. 116 of the Lunacy Act, 1890. The defendant, William Bringloe, was a certified male nurse and masseur, and was first engaged to attend on the testator on February 19, 1907, and continued to do so as occasion required until September 6, 1907, when he was regularly engaged by the receiver at a salary of 1*l*. 1*s*. a week to act as personal attendant to the testator from three to five hours every day in relief of the regular attendant. He did not sleep in the house, but took some meals there. This service continued until November 29, 1910, when he undertook night duty twelve hours at a time from 9 P.M. to 9 A.M., and, with the exception of one break in the summer of 1911, he was employed in this manner up to the time of the testator's death at a wage of 2*l*. 2*s*. a week paid monthly. He was absent from the testator's service from June 26 to October 23, 1911, as, owing to the strain of the attendance, he felt obliged to obtain some relief for the benefit of his health. During this time he received no wages. It was understood that he should return to the testator's service after the summer of 1911.

The testator died on April 28, 1912, and at the date of his death W. Bringloe was not under notice either given or received. During the whole of his attendance on the testator he was free to undertake other work outside the hours of his engagement, and he did so to a very limited extent.

The executors took out an originating summons on September 9, 1913, to have it determined, inter alia, whether, upon the true construction of the will and in the events which had happened, William Bringloe was entitled to receive the legacy as a domestic servant.

J. M. Stone, for the executors of the testator.

H. S. Preston, for William Bringloe. The defendant clearly comes within the definition of a "domestic" servant. His duties were arduous and ministered to the comfort of the testator: *Pearce* v. *Lansdowne* (1), where the question of what was a domestic or menial servant was discussed. Sleeping in the house is not a test, nor taking meals there. The defendant formed part of the testator's residential establishment. With regard to the time of his service, he was entitled to a holiday owing to the trying nature of his services. The holiday was merely a casual interruption of the service which need not be continuous from day to day during the whole of the two years. It was understood that he should return to his duties after the holiday was over.

W. H. Draper, for a residuary legatee. The applicant, being free to earn wages elsewhere, could not be really a "domestic" servant. There was a somewhat similar gift in the case of *Townshend* v. *Windham*. (2) Having regard to the long holiday of four months he was not in the testator's employment for two years prior to his death. It must mean continuous service for two years: *Darlow* v. *Edwards*. (3) This man was a special medical servant engaged at a weekly wage, and the expression as to the payment of "a year's wages" was therefore not applicable to him. Each case must turn upon its own facts, and on the facts here Bringloe was not entitled to the legacy.

H. S. Preston, in reply, referred to *In re Earl Sheffield* (4), which distinguished the case of *In re Ravensworth*. (5)

(1) (1893) 69 L. T. 316.
(2) (1706) 2 Vern. 546.
(3) (1862) 32 L. J. (Ex.) 51.
(4) [1911] 2 Ch. 267.
(5) [1905] 2 Ch. 1.

EVE J. (after allowing the claim of another applicant for a similar legacy, continued:) With regard to the respondent, William Bringloe, the facts are not in dispute. The testator's wife, who died on February 21, 1907, became aware very shortly before her death that the state of her husband's health was such as to necessitate the services of an attendant, and Bringloe, a certified male nurse, was engaged by her to look after the testator. After, and very largely in consequence of, her death the mental condition of the testator deteriorated, and in July, 1907, it became necessary to obtain the appointment of a receiver under the Lunacy Act, 1890. Down to that time Bringloe's attendances on the testator had been more or less of an intermittent nature, and when the receiver was appointed an arrangement was come to under which he was engaged to come to the house and be with the testator for a space of time—three to five hours every day—while the testator's regular attendant was resting. This arrangement was continued until November, 1910, when Bringloe's duties were changed and he became the testator's night attendant. These duties, involving a continuous attendance for twelve hours, he discharged for some seven months, and at the end of that time had been brought into a state of health, mental and bodily, which necessitated his asking for a long leave of absence. This was at once granted, and I cannot doubt, if the testator had then been in a condition of health enabling him to express his wishes, that he would have recognized the causes which had brought about the breakdown of his servant and would have felt bound to contribute to the man's maintenance during the period required for his restoration to health. The receiver was not in a position which justified him in making any such gratuitous contributions, but the leave of absence was granted on the footing that Bringloe was to resume his attendance on the testator when he was better. This he did after a rather prolonged, but not unduly prolonged, interval, and he thereupon remained with the testator down to his death in April, 1912. On these facts two points have been taken on behalf of those interested in the residue as grounds for disallowing Bringloe's claim to a legacy—the one that he was not a domestic servant, and the other that even if he was he did not fulfil the condition of being in the employment of the testator for two years prior to his decease.

I have not accepted Mr. Preston's invitation to consider the various meanings attached to the word "domestic" by the dictionaries he has consulted, because, in my opinion, it is used in this context as the equivalent of the word "household." When one speaks of articles of domestic use and ornament, one means articles of household use and ornament, and in like manner a "domestic servant" is, in my opinion, a household servant as distinguished from an outdoor servant. The first question is, was this man a domestic or household servant?

He was obviously a servant, and a servant of the testator, and not the less so because he was possessed of qualifications which enabled him, when not actually engaged with the testator, to add to his income by serving others. I do not think the fact that his services were distributed between the testator and others made him less a servant of the testator. So long as he fulfilled his contract with the testator he was free to occupy his spare time as he pleased, and the contract with the testator was, in my opinion, a contract for domestic service. The relations of the servant with the employer were of the most intimate and domestic character, and the circumstances that he was not at the call of his employer continuously during the whole of each twenty-four hours, and, as a general rule, did not sleep in the house, cannot, in my view, so alter the nature of the contract as to make the servant something else than a domestic servant. (1) Upon the second point Mr. Draper is no doubt quite right when he says that in order to comply with the condition attached to the bequest it is incumbent on the servant to shew that his service has been a continuous one for the period named by the testator. He cannot fulfil the condition by proving discontinuous periods of service amounting in the aggregate to two years. But even so, that does not, I think, involve the necessity of actual daily service for the whole period. It cannot be that if, owing to ill-health or for any other reasonable cause, the servant absents himself for a time and suspends his services with the full authority and consent of the employer, the continuity of the relationship of master and servant is thereby broken. It is true that in this case, in the circumstances I have mentioned, no payment was made to the servant while his absence continued, but I do not think this element is of itself conclusive, coupled as it was with the arrangement that he was to return to his duties as soon as his health was restored. The result is that, in my opinion, the service of the respondent was of such a nature as to qualify him to claim, and I think he is entitled to be paid, a legacy as a domestic servant of the testator.

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(1) [In *Nicoll* v. *Greaves* (1864) 17 C. B. (N.S.) 27, a huntsman was held to be a "menial" servant.—F. P.]

Solicitors: *Arthur Toovey, for Bennett & Co., Buxton; Robinson & Bradley; Peacock & Goddard, for Gaby & Stapylton-Smith, Hastings.*

G. M.

In re LOCKE & SMITH, LIMITED.
WIGAN *v.* THE COMPANY.

[1911 L. 1464.]

EVE J.
1914
Feb. 24.

Company—Debentures—Trust Deed—Remuneration of Trustees—Appointment of Receiver—Extent of Right to Remuneration.

A trust deed to secure the first mortgage debenture stock of a company contained a clause under which the trustees of the deed were to hold the moneys to arise under the primary trust for conversion upon trust to pay the costs and expenses in the execution of the trust, including their own remuneration. A further clause provided that the company should in every year, "during the continuance of this security," pay to the trustees for the time being of the deed, "as and by way of remuneration for their services as trustees the sum of 105*l.*"

In 1911 an action was commenced by the debenture stock holders of the company to carry the trusts of the indenture into execution, and a receiver was appointed on July 14, 1911.

The hereditaments and premises comprised in the trust deed were sold pursuant to orders of the Court and the proceeds paid into Court. The sole trustee of the deed, who had received his remuneration down to January 1, 1911, claimed to be paid his remuneration down to the close of the proceedings in the action, out of the proceeds of sale, in priority to the debenture-holders, and to have a lien declared:—

Held, that the trustee was entitled to his remuneration down to the date of the appointment of the receiver out of the proceeds of sale, but inasmuch as he had not rendered any appreciable services since that date he was not entitled to any further remuneration.

By the first of three debenture trust deeds (the original trust deed) dated April 14, 1897, entered into by the defendant company to secure first mortgage debenture stock, certain freehold, leasehold, and copyhold premises, and the benefit of certain licences, were conveyed, demised, and covenanted to be surrendered by the defendant company to Sir Frederick Wigan and Hanbury Barclay (both since deceased) upon the trusts therein declared for securing issues of first mortgage debenture stock of the defendant company amounting altogether to 100,000*l.* By clause 11 of this original trust deed the defendant company charged, in favour of the trustees of the deed, all their other assets (both present and future) with the payment of all moneys for the time being owing on the security of that deed and declared that such charge should rank as a floating security. By clause 13 of the deed it was declared that, after the security constituted by such deed became enforceable, the mortgaged premises should be held by the trustees upon trust for sale and conversion into money (thereinafter referred to as "the primary trust for conversion"). The other clauses relating to the questions raised by the summons in the action were as follows:—

Under clause 15 the security became enforceable in the event, inter alia, of a receiver of the company's undertaking being appointed.

Clause 19. "The trustees shall hold the moneys to arise from any sale, calling in, collection, or conversion under the primary trust for conversion, upon trust that they shall thereout in the first place pay or retain the costs and expenses incurred in or about the execution of such trust, or otherwise in relation to these presents, including therein their own remuneration, and shall apply the residue of the said moneys" in payment of (1.) all arrears of interest remaining unpaid on the stock, and (2.) all principal moneys due in respect of the said stock.

Clause 38. "The company shall in each and every year, during the continuance of this security, pay to the trustees for the time being of these presents as and by way of remuneration for their services as trustees the sum of 105*l.* by equal half-yearly payments on the 1st day of January and the 1st day of July in each year in addition to all travelling and other costs, charges, and expenses which they may incur in relation to the execution of the trusts hereby in them reposed, the first of such half-yearly payments shall be made on the 1st day of July, 1897. Such remuneration shall be divided equally between the said Sir Frederick Wigan and Hanbury Barclay, or such individuals as may for the time being be trustees thereof."

Clause 40 empowered the trustees to employ and pay an agent, whether being a solicitor or other person, to transact all business and do all acts required to be done in the trust.

Clause 41. "The trustees and every receiver, attorney, manager, agent or other person appointed by the trustees hereunder shall be entitled to be indemnified out of the mortgaged premises in respect of all liabilities and expenses incurred by them in the execution or purported execution of the trusts hereof, or of any powers, authorities, or discretions vested in them pursuant to these presents."

The trustees of this deed were also made the trustees of the two other debenture trust deeds. The survivor of the two original trustees died on March 4, 1909, and since that date the defendant, Henry Kemp Welch, had been sole trustee of the deeds. The present action was commenced on July 13, 1911, for the purpose of carrying into execution the trusts of the three indentures, and for the enforcement by foreclosure or sale of the securities thereby created, and for the appointment of a receiver and manager of the undertaking. By an order of July 14, 1911, the usual accounts and inquiries were directed, and William Slingsby Ogle was appointed receiver and manager on behalf of the plaintiffs and other holders of the first mortgage debenture stock. Pursuant to subsequent orders of November 15, 1912, and March 18, 1913, the hereditaments and premises comprised in the trust deeds were sold, and the proceeds, amounting to 47,156*l.* 8*s.* 8*d.*, paid into Court to the credit of the action.

The defendant, Henry Kemp Welch, received his remuneration as trustee down to January 1, 1911. Since the institution of the action he had rendered various services (detailed at length in paragraph 16 of an affidavit by his solicitor, William Kemp Welch) in connection with the beneficial realization of the properties. By an originating summons he now claimed to be paid his remuneration as provided by clause 38 of the indenture of April 14, 1897, from January 1, 1911, down to the close of the proceedings in the action, out of the proceeds of sales of the properties and assets of the defendant company, before the distribution of the proceeds amongst the holders of the mortgage debenture stock; and he also claimed a lien upon such proceeds of sale for the payment thereof.

W. R. Sheldon, for the trustee of the deed. The right of the trustee to remuneration is clear, having regard to the terms of the trust deed, and the decision in the case of *In re Piccadilly Hotel.* (1) Clause 18 in the trust deed in that case was similar to clause 19 in the present, and clause 34 there corresponded to clause 38 here. In the case of *Debenture Corporation* v. *Uttoxeter Brewery*, an unreported case referred to in Palmer's Company Precedents, 11th ed. pt. iii. p. 820, the words were slightly stronger than those to be found here, as in that case the remuneration was to be paid under clause 34 of the trust deed notwithstanding that the receiver had been appointed. Here it is "during the continuance of this security," but that amounts to almost the same thing. I contend that the trustee is entitled to his remuneration until the final distribution of the proceeds of sale, and being the sole trustee he takes the 105*l.* a year. The question of the effect of the appointment of a receiver and the right of retainer generally is discussed in Palmer's Company Precedents, 11th ed. pt. iii. p. 820, where, inter alia, the cases of *In re Accles* (2), *In re Jones* (3), and *In re South Western of Venezuela (Barquisimeto) Ry. Co.* (4) are discussed. The case of *In re Accles* (2) before Farwell J. was considered by Swinfen Eady J. in *In re Piccadilly Hotel* (1) and distinguished.

Austen-Cartmell, for the debenture-holders. The case of *In re Accles* (2) is inconsistent with the present case and is more consonant with justice. The trustees of debenture trust deeds

(1) [1911] 2 Ch. 534.
(2) [1902] W. N. 164; 51 W. R. 57.
(3) (1885) 31 Ch. D. 440.
(4) [1902] 1 Ch. 701.

should have remuneration only if they do work for it. There are grounds on which Swinfen Eady J. could have determined *In re Piccadilly Hotel* (1) which are consistent with the decision in *In re Accles* (2), and the Court can apply that decision without dissenting from *In re Piccadilly Hotel.* (1)

On the second branch of the case I ask the Court to follow the decision of Chitty J. in *Debenture Corporation* v. *Uttoxeter Brewery* (3), and not allow any remuneration after the date of the appointment of the receiver. Mr. Kemp Welch must shew that he has done services in order to earn his remuneration. Practically everything which has been done since the appointment of the receiver has been done by his solicitor, Mr. William Kemp Welch, who will be allowed these costs in the action. If the trustee is held entitled to remuneration, I do not object to his taking the whole of the specified remuneration which was originally divisible between the two trustees appointed by the deed.

EVE J. Two questions arise on this summons, the one whether the trustee of the debenture stock deed has, as against the stockholders, any right to be remunerated out of the proceeds of their security, and the other, assuming he has such right, what is the extent thereof?

As a general rule, speaking from my own experience, the burden imposed on those who become trustees for debenture stock holders is not of a very onerous nature. So long as the company is successful their duties are of a nominal if not altogether ornamental character, and almost invariably, when the time for action arrives and responsibilities are thrust upon them, they either at once resort themselves to the Court or acquiesce in one or more of their beneficiaries so doing. Thereupon the Court relieves them from further responsibility, and for all practical purposes supersedes them by appointing at their own instigation or with their assent a paid receiver.

These considerations require that any claim to remuneration out of the trust estate should be clearly established by contract between the trustees and the stockholder, and upon this part of the case I respectfully adopt the principles underlying the judgment of Farwell J. in *In re Accles.* (1) But, so far as I am concerned, the question as to this trustee's right to remuneration out of the proceeds of the security is concluded by authority. In *In re Piccadilly Hotel* (2) Swinfen Eady J. held that clause 18 of the trust deed he was there construing, which was practically identical with clause 19 of the deed before me, was a declaration of the trusts of the proceeds of sale however they might have arisen, and that the right of the trustee to have his remuneration paid out of such proceeds was thereby established.

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(1) [1911] 2 Ch. 534.

(2) [1902] W. N. 164; 51 W. R. 57.

(3) April 25, 1895. Unreported.

Mr. Austen-Cartmell has endeavoured to point out other grounds upon which he suggests the judgment of Swinfen Eady J. may in part have proceeded, but I cannot read the language of the learned judge (3) commencing with the words "clause 18 is really a declaration of trust of those surplus proceeds however they arise" without coming to the conclusion that he did in fact put a construction upon the clause by which I am bound, and by which he distinguished the position of the trustee under clause 18 of the deed he was there construing from his position under clauses 33 and 35 of the deed which Farwell J. construed, and that being so, I cannot do otherwise than adopt that construction. I hold, therefore, that the trustee is entitled to be paid his remuneration from December 31, 1910, down to July 14, 1911, out of the proceeds of sale.

The question whether the same right to remuneration continued after the appointment of the receiver on July 14, 1911, has now to be considered. Mr. Sheldon argues that as the covenant by the company to pay remuneration is a covenant to pay in every year "during the continuance of the security," and as the security continues down to the final distribution of the proceeds of sale, the right to remuneration continues down to the same date. But that argument leaves out of sight the fact that the payment is to be made to the trustee "as and by way of remuneration for his services." There is nothing in this deed

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(1) [1902] W. N. 164; 51 W. R. 57.

(2) [1911] 2 Ch. 534.

(3) [1911] 2 Ch. 543.

EVE J.
1914
LOCKE & SMITH, LIMITED, *In re.*
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answering to the proviso in the deed before Swinfen Eady J. whereby it was expressly stipulated that the appointment of a receiver should not determine the trustee's right to remuneration, and the decision on that deed does not therefore conclude this point. In the case of *Debenture Corporation* v. *Uttoxeter Brewery*, not reported, but dealt with at some length in Palmer's Company Precedents, 11th ed. pt. iii. p. 820, Chitty J., dealing with a covenant similar to the one I have before me, admitted the trustee's claim to remuneration down to the appointment of the receiver, but disallowed any remuneration after the appointment. In the ordinary course where a receiver is appointed in a debenture-holders' action the services of the trustee are terminated, and in such a case I think Chitty J.'s decision ought to be followed, for in such circumstances it would be little less than monstrous to charge the debenture-holders with the remuneration of both the trustee and the receiver. But of course there may be cases in which the trustee does render services after the receiver's appointment which entitle him to receive remuneration notwithstanding that appointment, and a case is sought to be established here that the trustee has in fact rendered such services. Without making any reflection on the trustee it is necessary to scrutinize with care the services for which, according to his solicitor's affidavit, he claims to be remunerated. There are, undoubtedly, in the list some matters which required the personal attention of the trustee, such, for example, as the attendance at a meeting, but, on the other hand, I think I am not going too far in saying that almost all the matters enumerated in paragraph 16 of the affidavit are matters which Mr. Kemp Welch as a man of business has rightly left to be performed by his solicitor, and which will be properly included in his bill of costs in the action. I must eliminate all this work from the present inquiry, and when that is done there is very little if anything left for which remuneration can fairly be said to have been earned. I propose therefore to follow the course adopted by Chitty J. I think there are no services rendered after the appointment of the receiver for which I ought to allow any remuneration. The result is that the trustee must be paid his remuneration down to July 14, 1911, out of the proceeds of sale, but as from that date no further remuneration will be allowed to him. The costs will be costs in the action.

Solicitors: *W. Kemp Welch; Wigan, Champernowne & Prescott.*

G. M.

EVE J.
1914
Feb. 26.

In re MEARS.
PARKER *v.* MEARS.

[1913 M. 2726.]

Will—Construction—Gap in Provisions—Capital of Shares not disposed of—Supplying Omission by Implication—" Survivors or survivor."

Testator bequeathed personal estate on trust for conversion and to pay the income to his three daughters equally for life, and after the decease of any of them leaving issue to pay a third part of the capital of the trust fund to her children, and in the event of any of his daughters dying without leaving issue the survivors or survivor were to take her share of the income for life, and in case all his daughters should die without leaving issue the capital of the trust fund was to be divided among his next of kin. Two daughters died, one leaving children. On the third dying subsequently without issue:—

Held, that there was an intestacy as to two thirds of the capital.

By his will dated January 26, 1847, Joseph Mears, after making certain specific devises and bequests, gave all stock and money in the public funds that might be standing in his name at the time of his decease and all other his personal estate to trustees upon trust for conversion and, after payment thereout of his debts and funeral and testamentary expenses and a legacy, upon trust for investment of the residue, and he declared that his trustees should stand possessed of the said bank stock and moneys directed to be invested upon trust to pay the interest and dividends arising therefrom " unto and between my three daughters Frances Parker the wife of George Parker . . . . Sarah Mears and Hannah Mears during their respective lives in equal shares and proportions share alike for their separate use . . . . and from and after the decease of my said daughters or any or either of them leaving issue upon further trust to pay or apply the part or share of the one or other of them so dying of and in the said interest and dividends unto or amongst all and every her or their child or children for and towards their maintenance education and support during their respective minorities and as and when they shall severally attain the age of twenty-one years upon further trust to pay or transfer an equal third part or share of the said stock or principal moneys out of which the said interest and dividends are payable unto and amongst the child or children of each and every of my said daughters leaving issue as aforesaid in equal shares and proportions share and share alike and I authorise my said trustees and the survivor of them to advance so much of each child's share out of the said stock or principal moneys to which they may become entitled as aforesaid as they may consider expedient for his her or their preferment in life during his her or their minority And in the event of any or either of them my said daughters dying without leaving issue then I will and direct that the survivors or survivor of them shall be entitled to receive and take the share or shares of such deceased daughter or daughters of and in the said interest and dividends for life And in case all my said daughters should die without leaving issue then upon the decease of the last survivor I will and direct that the said stock or principal moneys shall go to and be divided among my next of kin according to the Statute of Distributions."

The testator died on February 12, 1852, leaving his three daughters Frances (then Mrs. Parker), Sarah (afterwards Mrs. Ellis), and Hannah him surviving.

The three daughters received the income of the trust fund till the death of Hannah, who died a spinster on October 29, 1879.

From the death of Hannah till the death of Frances (Mrs. Parker) on October 7, 1891, the income was paid to Mrs. Parker and Sarah (Mrs. Ellis).

On the death of Mrs. Parker leaving children, all of whom attained the age of twenty-one, one third of the capital of the trust fund was paid over to those children.

Since Mrs. Parker's death, the income of the remaining two thirds of the trust fund was paid to Mrs. Ellis.

Mrs. Ellis died in 1913 without having had any children.

The question then arose how the capital of the two thirds of the trust fund was to be dealt with, namely, whether it devolved upon the children, or representatives of the children, of Mrs. Parker, or whether there was an intestacy in regard to it.

This summons was taken out by one of the children of Mrs. Parker accordingly.

Ingpen, K.C., and *A. M. Begg*, for the plaintiff. Cross limitations are to be implied so as to pass the two thirds to the issue of Frances: *In re Hudson* (1); *In re Ridge's Trusts.* (2) Not to imply them is to contradict what is in the will.

Clayton, K.C., and *J. W. Manning*, for one of testator's next of kin. The case is plain against the plaintiff's contention. There is an intestacy: *Harrison* v. *Harrison* (3); *In re Bowman.* (4) In order that there may be stirpital survivorship, there must be a gift in remainder in favour of the children of the survivor. There is no such gift in remainder here. The plaintiff, to succeed, must get over two difficulties: he must read " survivors or survivor " as " others or other " and say that the daughter who died second and was not in fact a survivor was a " survivor," and he must find a gift over in favour of the survivor's children—which is the key to the whole of his position: *Waite* v. *Littlewood* (5); *Badger* v. *Gregory* (6); *Wake* v. *Varah.* (7) An essential element of his case is that the " survivor " must take qua survivor, for otherwise there is not stirpital survivorship. And it is essential that the survivor shall take an interest in the accruing as well as the original share. Those essentials do not exist here. Before there can be an estate by implication it must be certain what the implication is. It is true there is a gift over to the next of kin, but they take by virtue of the statute.

P. F. Wheeler, for others of the next of kin. The gap is so obvious that the testator must have intended it. Cross limitations are only implied where the hiatus appears to have been

(1) (1882) 20 Ch. D. 406.
(2) (1872) L. R. 7 Ch. 665.
(3) [1901] 2 Ch. 136.
(4) (1889) 41 Ch. D. 525.
(5) (1872) L. R. 8 Ch. 70.
(6) (1869) L. R. 8 Eq. 78.
(7) (1876) 2 Ch. D. 348

unintentional: *In re Hudson* (1); *In re Ridge's Trusts.* (2) The Court has never implied cross limitations in a case where the meaning has been so plain as it is here. The testator has distinctly and intentionally omitted to make special provision for the destination of capital in the case of one or two daughters only dying without issue. In that case there is an intestacy.

A. Beddall, for the trustees.

Ingpen, K.C., in reply. This is not the case of an intentional gap in the will. The cases cited by the other side refer to express survivorship as to capital, not to general failure of issue without reference to survivorship as regards capital as here. There is in the present case just such a gift over on failure of issue of all as is referred to in Hawkins on Wills, 2nd ed. p. 250, where the question is considered relating to "surviving" being read as "other," which is not the question here. This case falls within *In re Hudson* (1) and *In re Ridge's Trusts.* (2) The Court will supply what is omitted in the will.

EVE J. It is clear there is a gap in the testator's will in that in the event of one or two only of his three daughters dying without leaving issue he has not disposed of the capital of the share or shares of the daughter or daughters so dying. All parties admit the existence of the gap, and Mr. Wheeler for parties claiming under an intestacy says that the omission is so palpable and obvious that the testator must himself have appreciated it. I doubt very much whether he did, but, whether he did or not, the question I have to determine is whether the gap is one where, to use the words of James L.J. in *In re Ridge's Trusts* (3), the Court is "authorized and bound to fill in the will, and to supply the gaps by judicial implication of the testator's meaning."

The applicant relies on the ultimate gift over as clearly indicating that the testator did not contemplate his estate being diverted from his grandchildren, if there were any such to take it, and urges that it would be doing violence to the testator's obvious intention to hold that two thirds of the estate now pass to the

(1) 20 Ch. D. 406.
(2) L. R. 7 Ch. 665.
(3) L. R. 7 Ch. 668.

next of kin when there are grandchildren, issue of his daughter Frances, in existence. On the other hand it is said by those who allege there is an intestacy, "Why is any implication necessary? The will gives rise to no doubt or ambiguity, then why should the Court take upon itself to supply and read in limitations which the testator has left out, and left out at the very moment when his attention must have been directed to a state of things calling for the very limitation which it is now sought to read into his will but which he has omitted?" I think there is great force in that argument. The testator deals first with what is to happen to a share in the case of a daughter who dies leaving issue, then he goes to the alternative case of a daughter who dies without leaving issue. This is not a case where he has not contemplated that event at all; he has not only contemplated it, but he has dealt up to a certain point with the share of a daughter so dying by providing that the income of that share is to be received and taken by the survivors or survivor of his daughters for life. But then he stops short, and abstains from dealing with the capital of the share. In that state of things am I justified in inserting after the gift of the income to the survivors or survivor of the three daughters a gift of the capital to their issue in equal shares? I do not think I am. Were I to do so it would involve, as Mr. Clayton has pointed out, my also construing the words "survivors or survivor" as equivalent to "others or other." But why should I so alter this will as to impose on those words an unnatural construction when if I read the will as it stands they bear their proper and natural construction? I do not think I am entitled first to fill up the gap by inserting the gift in remainder and then to construe the words "survivors or survivor" as meaning "others or other." I must first construe the will as it stands, and no case has been cited which supports the contention of the applicant that the gift of a life interest to the survivors or survivor without any gift in remainder to their children or issue creates a situation in which the Court ought to imply such a gift or impose on the words "survivors or survivor" any meaning other than their strict and proper meaning. Accordingly I must hold, in the events which have happened, that the capital of the two third shares of the daughters who died without issue is undisposed of and passes to the next of kin of the testator to be ascertained at the time of his death.

EVE J.
1914
MEARS, *In re.*
PARKER *v.* MEARS.

Solicitors: *Duffield, Bruty & Co.; John Ashbridge.*

A. L.

OSRAM LAMP WORKS, LIMITED *v.* GABRIEL LAMP COMPANY. (1)

[1912 O. 1359.]

EVE J.
1914
Feb. 11, 27.

Practice — Discovery — Interrogatories — Patent — Infringement — Names of Manufacturers of Infringing Articles—Principle on which Interrogatories allowed.

In an action to restrain an alleged infringement of a patent it is legitimate to save labour and expense by means of interrogatories directed to obtain admissions of facts which the party interrogating must prove in order to establish his case; but it is not legitimate where the admissions sought relate to facts which it is not incumbent on the interrogating party to prove, but which, if proved, may assist him in proving those facts on the proof of which his right to relief depends.

PROCEDURE SUMMONS.

This was an application by the plaintiffs for a further and better affidavit in answer to two interrogatories, Nos. 5 and 6, administered to the defendants.

The plaintiffs were the registered owners of two letters patent for an invention of (1.) "improvements relating to the manufacture of incandescent electric lamps," and (2.) of an "improved method of producing metallic incandescence bodies for electric glow lamps." They alleged that the defendants had infringed their letters patent, and claimed an injunction to restrain them from so doing, and an inquiry as to damages, with consequential relief.

The defendants did not themselves manufacture the lamps which were alleged to be infringements of the patent, but purchased them from others; they denied the infringement and the validity of the patents.

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(1) Reversed in C. A. April 7, W. N. 171.

By their interrogatories the plaintiffs asked, inter alia, the following questions:—

"1. Did the defendants or either and which of them sell on or about the 9th day of October, 1912, or some other and what date to Messrs. Maxwell, Butcher & Co., of 77a, Queen Victoria Street, in the city of London, 150 or some and what number of lamps? If yea, is the invoice, a copy of which is annexed hereto and the original of which may be inspected at the offices of the plaintiffs' solicitors, the invoice issued by the defendants or either and which of them for the said lamps?"

"5. If the answer to the first interrogatory is in the affirmative, were the said lamps, or any and which of them, manufactured, wholly or in part, and if in part which part, by the Compagnie Générale d'Electricité, of 5, Rue Boudreau, Paris, or by some other and what persons or firms?"

"6. If the answer to the first interrogatory is in the affirmative, were the said lamps or any and which of them supplied to the defendants or either and which of them (either wholly or in part and if in part which part) by the Compagnie Générale d' Electricité, of 5, Rue Boudreau, Paris, or by some other and what persons or firms and on what date?"

"7. If the answer to the first interrogatory is in the affirmative, were the filaments of the said lamps, or any and which of them prepared by mixing tungsten, or some and what compound or compounds thereof, with some and what organic binding medium, whether or not then preparing the product in the form of filaments and whether or not then forming and carbonizing the said filaments, and then by some and what means removing the carbon from the said filaments?"

The first of these interrogatories was answered in the affirmative by Mr. Henry J. Simpson, the secretary of the Electric and General Works, Limited, trading as the Gabriel Lamp Company. His answers to the other three interrogatories were as follows:—

"5. I object to answer the fifth interrogatory on the ground that it is irrevelant and immaterial to the issues to be tried in this action and is not put bona fide for the purposes of this action."

"6. In answer to the sixth interrogatory I say that the said lamps were supplied to the defendants, the Gabriel Lamp Company, but I object to state by whom the said lamps were supplied on the ground that such information is irrelevant and immaterial to the issues to be tried in this action and is not sought bona fide for the purposes of this action. I do not know nor have I the means of ascertaining on what date the said lamps were supplied to the Gabriel Lamp Company."

"7. In answer to the seventh interrogatory I say that I have no personal knowledge whatever as to the matters inquired of in the said interrogatory. I have made inquiries of the directors, officers, and servants of the Electric and General Works, Limited, trading as the Gabriel Lamp Company, as to what knowledge they have acquired as directors, officers, and servants of the said company with regard to the matters inquired of by the said interrogatory, and I have been unable to obtain any information thereon, the said directors, officers and servants informing me that they possess no knowledge as to the process employed in the manufacture of the said filaments, or any of them."

J. H. Gray, for the summons. The plaintiffs are entitled to obtain particulars from the defendants of the sources from which the lamps were obtained, otherwise they may not be able to discover and establish the process which was actually employed in the manufacture of the infringing lamps.

Kenneth R. Swan, for the defendant company. The fifth and sixth interrogatories are not material to the issue to be tried, though the answers may be useful to the plaintiffs.

This type of interrogatory is not permissible. The case of *Marriott* v. *Chamberlain* (1) shews what are admissible and what are not.

The principle on which the Court proceeds appears from the case of *Nash* v. *Layton* (2), and I rely upon the dictum of Lord Esher M.R. quoted from *Marriott* v. *Chamberlain.* (1) The dictum also of A. L. Smith L.J. in the case of *Kennedy* v. *Dodson* (3) fits this case exactly. "The only legitimate use of interrogatories is to obtain from the party interrogated admissions

(1) (1886) 17 Q. B. D. 154.
(2) [1911] 2 Ch. 71, 76.
(3) [1895] 1 Ch. 334, 341.

of facts which it is necessary for the party interrogating to prove in order to establish his case; and if the party interrogating goes further, and seeks by his interrogatories to get from the other party matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted." Here it is not incumbent upon the plaintiffs to prove the identity of the manufacturers of these filaments.

J. H. Gray in reply. It is part of my chain of evidence to prove the sources of supply.

Cur. adv. vult.

Feb. 27. EVE J. This is a summons for a further and better answer by the defendants to two interrogatories put for their examination by the plaintiffs.

The action is one for an injunction to restrain an alleged infringement by the defendants of certain letters patent of which the plaintiffs are the registered owners. The subject-matters of the letters patent, two in number, are "improvements relating to the manufacture of incandescent electric lamps" and "an improved method of producing metallic incandescence bodies for electric glow lamps." By the particulars of breaches the plaintiffs complain of a particular sale by the defendants in October, 1912, of 150 lamps, and the issuing by them in the years 1910 and 1911 of certain circulars and in 1912 of a certain advertisement. By an order of November 10, 1913, liberty was given to the plaintiffs to deliver to the defendants seven interrogatories. Of these the first, fifth, and sixth are as follows: [His Lordship read these interrogatories and the answers to the fifth and sixth.] By this summons the plaintiffs ask that the defendants may be ordered to file a further answer to interrogatories 5 and 6, and they do so on the ground that, it being well nigh, if not quite, impracticable to ascertain by examination or analysis the process employed in the manufacture of the filaments of the alleged infringing lamps, and the defendants themselves, as appears by their answer to the seventh interrogatory, being ignorant of the process, the plaintiffs ought to be allowed to obtain from the defendants particulars of the source or sources from which the lamps were obtained, as they will thereby be enabled to identify and establish the process of manufacture actually employed in the production of the particular lamps. The question I have to decide is whether the information sought by the plaintiffs is the proper subject-matter of an interrogatory.

I do not think it is. No doubt an answer to the questions would be of material assistance to the plaintiffs in preparing their case for trial, and the information if obtained at this stage would probably save them much labour and some expense, but is the attainment of these objects legitimately brought about by means of interrogatories? In some circumstances "Yes," in others "No." It is legitimate to save labour and expense by means of interrogatories directed to obtain admissions of facts which the party interrogating must prove in order to establish his case; it is not legitimate where the admissions sought relate to facts which it is not incumbent on the interrogating party to prove, but which, if proved, may assist him in proving those facts on the proof of which his right to relief depends.

I think these are the principles laid down by the Court of Appeal in *Kennedy* v. *Dodson* (1) and adopted by the same Court in *Nash* v. *Layton* (2), and applying them here I must dismiss this summons, the costs of which will be the defendants' in any event.

Solicitors: *Bristows, Cooke & Carpmael; Jonathan E. Harris.*

(1) [1895] 1 Ch. 334.
(2) [1911] 2 Ch. 71.

G. M.

SARGANT J.

1914

Feb. 16, 17, 18.

PETTEY *v.* PARSONS.

[1913 P. 105.]

Easement—Right of Way—Private Road—Rights of Entry of Owner of Dominant Tenement—Obstruction by Gates—Damages in lieu of Injunction—Payment into Court with Denial of Liability—Costs—Rules of the Supreme Court, 1883, *Order* XXII., *r.* 6.

Where a right of way over land laid out as a roadway is granted or reserved to the owner of adjoining land as appurtenant thereto and to every part thereof, he may pass from his land to the roadway at any point which he may from time to time desire, and may for that purpose remove any part of his fence.

Where, prima facie, an unrestricted right of way over one person's land has been granted or reserved to another person and there is no bargain that the owner of the servient tenement shall be entitled to place a gate across the entrance of the roadway, nor any surrounding circumstances from which the inference that there was such a bargain can be drawn, so placing a gate is an obstruction of the way giving the owner of the easement a right of action.

The ratio decidendi of *James* v. *Hayward* (1630) W. Jo. 221 followed.

Andrews v. *Paradise* (1725) 8 Mod. 318, explained.

The defendant granted to the plaintiff a piece of land to the extreme south of the bulk of his own land, and an adjoining piece of land (coloured blue on a plan) to the north of the land so granted, reserving to himself, his heirs and assigns, owner or owners of a messuage and land adjoining the blue land on the north, and his and their tenants and servants, and all other persons authorized in that behalf by him and them, from time to time and at all times and for all purposes, to pass and repass, with or without animals, carts, and carriages, over and along a road ten feet wide covenanted to be made by the plaintiff on the blue land; and the plaintiff by the same deed, as beneficial owner, granted to the defendant in fee simple the same right of way "as appurtenant to the same land and every part thereof." The plaintiff made the ten-foot road on the blue land, the defendant's fence along the middle of it being moved back to the boundary of his own land on the north. The defendant built shops on his land and at the south-east corner thereof removed his fence for some sixteen feet along the roadway, so placing his shop frontage at this point that he left a triangular piece of his own land vacant, and bounded on one side by the frontage, on another by a public highway, and on the third side by sixteen feet of the private road. The plaintiff then put a railing along this sixteen feet and erected a gate across the eastern entrance from the highway to the private road. The defendant promptly removed both railing and gateway :—

Held, that the defendant was justified by the terms of the grant of his right of way in removing the rail and gate.

The defendant had erected on his land a pilaster which, at a height of some twelve feet above the private road, projected about twenty inches over. The plaintiff asked for a mandatory injunction for the removal of the pilaster, but the defendant, while denying liability, paid 5*l.* into Court, and pleaded that that was enough to satisfy the plaintiff's claim in respect of the projection :—

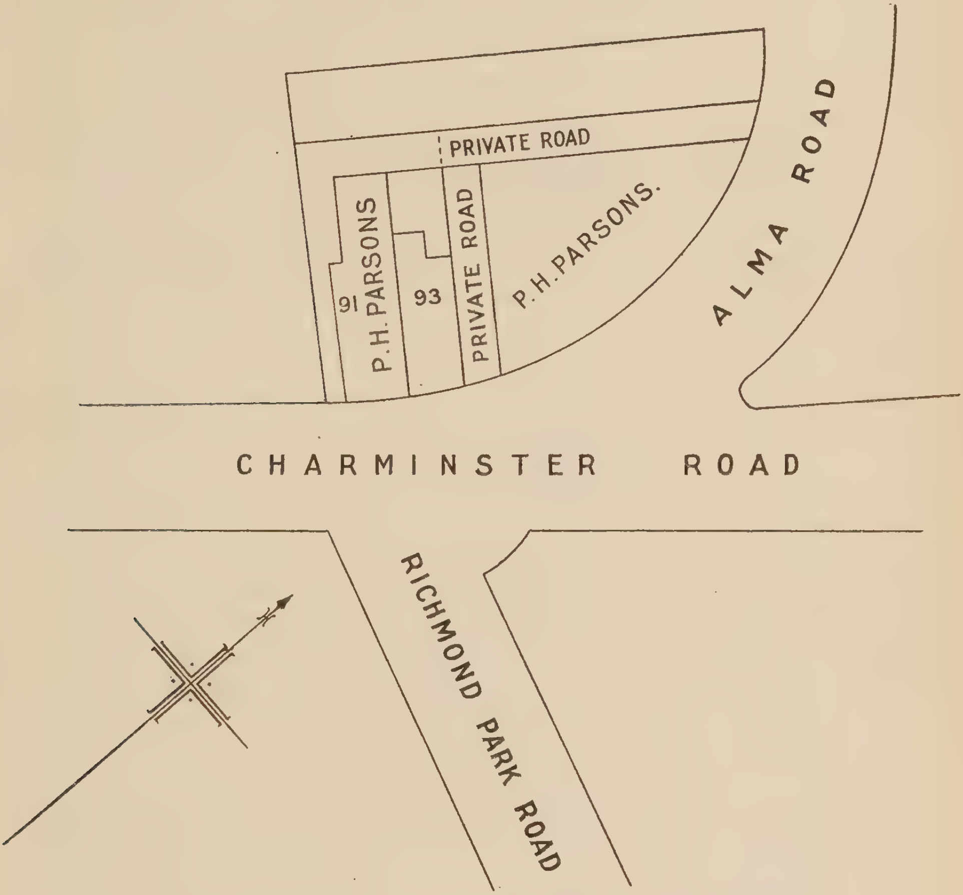
Held, that damages should be awarded in lieu of a mandatory injunction, and that, as damages to the amount of more than 5*l.* had not been shewn and the judge was not satisfied that there were reasonable grounds for not accepting the sum paid in, the plaintiff must, under Rules of the Supreme Court, 1883, Order XXII., r. 6, pay the costs of the issue as to liability in respect of the pilaster.

In the year 1909 the defendant, Percy Herbert Parsons, contracted to buy certain lands and buildings which formed together practically a quarter of an ellipse. The curve of the ellipse was on the north-east of the property and formed the frontage to the junction of the Charminster Road, Bournemouth, with the Alma Road. The southern boundary of the land was a straight line and the piece of land next and to the north of that line was occupied by a house, No. 91, Charminster Road. The western boundary of the whole of the land purchased was also a straight line, and was formed by a private road (coloured yellow on the plan on the conveyance below mentioned), which gave access to the backs of Nos. 91 and 93, Charminster Road, those two houses having a frontage of about twenty feet each to the Charminster Road on the east, and running back to what was something like sixty-five to seventy feet. Immediately to the north of No. 91, Charminster Road was No. 93, Charminster Road, and along the northern boundary of the latter there was, at the date of the purchase by the defendant, a footpath some four or five feet wide. That footpath led from the Charminster Road on the east to the private road coloured yellow on the west, and his Lordship drew the inference, in favour of the defendant so far as it went, that normally each end of the footpath was protected by a gate, and that these gates had been from time to time knocked down and replaced. People could, therefore, go along the footpath from east to west, get into the private road coloured yellow, and go out north along the yellow road into the Alma Road. The yellow road was sufficiently wide to be used by vehicles, and was protected at its northern extremity by gates.

When the negotiations for the purchase by the defendant were taking place, some time in the summer of 1909, he entered into a corresponding negotiation with the plaintiff, Mrs. Peninnah Pettey, for the sale to her of No. 93, Charminster Road, which when it became her property would be bounded on the south by the defendant's shop, No. 91, Charminster Road, and on the north by the defendant's other property, namely, the narrow footpath, and beyond that by land lying to the north of it, which lastly mentioned land was then used as market gardens.

During her negotiations with the defendant the plaintiff saw that the narrowness of the footpath was an objection to the value of the property she wanted to purchase, first because it hardly gave her enough light and air if buildings were erected on the defendant's land to the north of it, and secondly because she required a sufficient access along the north of her property for vehicles, so that they could pass from east to west or vice versa, and could turn north into the yellow road, or could come south and turn into the Charminster Road on the east. Accordingly it was arranged between the plaintiff and the defendant that the footpath should be widened from four or five feet to ten feet and that for that purpose the fence on the north side of the footpath should be set back some six feet.

That was carried out by a conveyance, dated October 20, 1909 (a day after the conveyance to the defendant had been made), from the defendant to the plaintiff, and the rights of the parties, his Lordship held, depended on this conveyance and nothing else. After recitals as to title and a recital that the vendor had agreed with the purchaser for the sale to her of the hereditaments and premises thereinafter contained " with such right of way over the private roadway shown on the plan drawn on these presents " (of which the plan in this report is a copy) " as is secondly hereinafter described," it was witnessed that the vendor as beneficial owner conveyed to the purchaser first the pieces of land at the corner of the Charminster and Alma Roads, together with the semi-detached messuage and shop, stabling, coach-house, and stores erected on the same plots or some part thereof and known as No. 93, Charminster Road and coloured pink and blue on the



plan (the site of the intended ten-foot road being coloured blue), "excepting and reserving full right and liberty for the vendor, his heirs and assigns, owner or owners for the time being of the messuage and premises now known as No. 91 Charminster Road and of the land lying to the north of the land coloured blue on the said plan, and his and their tenants and servants, and all other persons authorised in that behalf by him or them, from time to time and at all times hereafter, at his and their will and pleasure and for all purposes, to pass and repass, with or without horses, cattle, and other animals, carts, and carriages, over and along the road ten feet wide to be made by the purchaser over the land coloured blue in the plan drawn hereon in accordance with the covenant hereinafter contained, but no vehicle of any description shall be allowed to be stationary on the said road," and also excepting and reserving to the vendor, his heirs and assigns, owners for the time being of the vacant land to the north of the blue land, to build upon that vacant land, " and also excepting and reserving for the vendor, his heirs and assigns, owners of the said land now vacant, the right of eaves of any building to be erected by him or them to overhang the said land coloured blue on the said plan to a width not exceeding two feet, And secondly full right and liberty for the purchaser, her heirs and assigns, and her and their tenants and all other persons authorised by her or them in that behalf" to use the yellow private way up to and so far as the back gate of No. 93, Charminster Road, being the dotted line shewn on the plan, to hold the premises first and secondly described, except and reserved as aforesaid, unto and to the use of the purchaser, her heirs and assigns, in fee simple. In a later part of the deed the purchaser covenanted that she, her heirs and assigns, would within twelve calendar months make into, and for ever after maintain as a road, the land coloured blue, and would pave the same with blue bricks, and that she, her heirs and assigns, would pay to the vendor, his heirs and assigns, one moiety of the costs of maintaining and keeping in good repair and condition the yellow road and the gates leading therefrom into Alma Road. The deed concluded by witnessing that the purchaser, as beneficial owner, granted to the vendor " the right of way and easement of eaves described in the parcels first hereinbefore conveyed, To hold the same unto and to the use of the vendor in fee simple as appurtenant to the vendor's land and every part thereof."

At and before the time when the above-mentioned negotiations took place there were stables at the rear of the property at which a few horses were kept, and carts were already coming along the yellow road.

The plaintiff owned a large number of dairy shops in different parts of Bournemouth, and No. 93, Charminster Road was intended to be, and was afterwards, used by her as one of these milk shops.

His Lordship found as a fact that the defendant never promised the plaintiff as she alleged that she should have a right of putting up a gate at the east end of the blue road, and of putting something on it to indicate the business she was going to carry on.

Immediately after the purchase the plaintiff gave notice to quit to the tenant of No. 93, Charminster Road.

In August or September, 1910, the plaintiff paved the blue road with blue bricks, which were about two inches higher than the pavement on the Charminster Road at the east end and four or five inches higher than the defendant's land to the north of the blue road.

In November, 1910, the defendant began to prepare plans for new shops which he was desirous of erecting on his land to the north of the blue road, along the Charminster Road or Alma Road frontage, and the plaintiff consented to give up a strip of land to the north near the yellow road, as the Corporation of Bournemouth thought the blue road was too narrow. In March, 1911, the plans were approved by the corporation, and in May, 1911, the erection of the shops was begun, and by July 1 the pilaster referred to below was finished. About the end of November, 1911, the shops were finished except that the fronts were not put in, so that they might be made in accordance with the desires and conveniences of tenants.

The new shops, where they fronted the blue road at its north-east corner, were not brought close up to the blue road, but were carried back in a sort of curve leaving open a nearly triangular piece of the defendant's adjoining land lying to the north of the blue road at the east end thereof, and sixteen feet two inches from the pavement of the Charminster Road the defendant erected a pilaster which projected a few inches at its base over the blue road, and which at a height of some twelve feet from the road was gradually brought forward and projected over the blue road about one foot eight inches. The plaintiff did not complain of this encroachment until February 8, 1913.

On February 11, 1913, the plaintiff's builder altered the blue bricks at the east end of the blue road abutting on Charminster Road so as to smooth off the drop of two inches between that end of the bricks and the pavement; and about May 6, with the plaintiff's leave, the defendant sloped the blue bricks towards the Alma Road so as to make the bricks along about sixteen feet of the east end of the blue road slope down towards his land. During the erection of the shops the fence for sixteen feet two inches at the east end of the blue road, and between it and the defendant's land, was pulled down by him.

About May 8, 1913, the plaintiff required this fence to be restored so as to keep the road private, and, after some discussion, she on May 23 erected, along the sixteen feet two inches of frontage between the blue road and the defendant's land, a narrow iron railing, and she also erected across the east end of the blue road, fronting on Charminster Road, an ornamental iron gate containing her name. The same evening the defendant caused the railing to be removed, and either on that or the next day he, by inadvertence, charged up to the gate in his motor car and knocked the gate down.

The plaintiff shortly afterwards commenced the present action, claiming (1.) a declaration that she was entitled to erect and maintain a gate at the east end of the blue road; (2.) a declaration that she was entitled to erect and maintain a fence along the north side of the blue road from the east end thereof to the corner of the defendant's shops, or, in the alternative, to erect and maintain a fence in the position aforesaid with a gate therein sufficient to give the defendant reasonable access to the blue road from his land on the north side thereof; (3.) an injunction to restrain the defendant from pulling down or otherwise interfering with any gate or fence which the plaintiff might erect in the positions aforesaid in accordance with her rights as declared by the Court; (4.) an injunction to restrain the defendant from permitting any part of his buildings, other than eaves, to encroach on or overhang any part of the soil of the blue road.

The defendant, in his defence, said that after the execution of the conveyance to the plaintiff the wooden fence north of the old footpath was removed by him and temporarily re-erected to the north of but immediately adjoining the northern boundary of the blue road, and that it was removed when he began to build, and that the erection of any gate at the east end of the blue road would be a breach of the plaintiff's implied covenant for quiet enjoyment; and he denied that the plaintiff was entitled to erect any fence, or wall, or gate on the blue road, or in that or any other way to obstruct the defendant's right of passage over the whole of the blue road or his right of entering the same from each and every part of his land on the north side thereof. As regarded the pilaster, he admitted that it very slightly projected over or extended into the blue road, and said that before action he had offered to set back the base of the pilaster to its proper alignment or to acknowledge the plaintiff's right to such setting back of the base and offered further an indemnity against any damage by reason of the projection over the blue road. He also contended that the cornices or projections complained of were erected and maintained by him under and by virtue of the rights reserved to him by the conveyance to the plaintiff. Alternatively, and whilst denying any liability, he pleaded that he brought into Court 5*l*., and said that was enough to satisfy the plaintiff's claim in respect of the projection.

The action was tried by Sargant J.

Martelli, K.C., and *Harold B. Bompas*, for the plaintiff. What was granted by the conveyance was a private right of way over land belonging to the plaintiff; but the soil belongs to her, and she can do what she likes with it so long as she leaves to the defendant a reasonable user and enjoyment of it—for instance, she may build on the roadway so long as the building does not unreasonably interfere with the defendant's right of passage; but he is not entitled to the use of every square inch of the surface, for instance the part covered by a gate: *Clifford* v. *Hoare* (1); *Hutton* v. *Hamboro.* (2) The defendant cannot enter the blue road at any points he likes, by breaking down the fence there and going through the gap on to the road either through or without a gate; all that was granted was the right to use the way as it existed when the road had been widened and the fence put back: *Henning* v. *Burnet.* (1)

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(1) (1874) L. R. 9 C. P. 362.

(2) (1860) 2 F. & F. 218.

The right of the defendant to use the road by himself, his tenants and servants, and persons authorized by him, does not give him the right openly to invite the public to use the blue road, and it was never contemplated that the public should be allowed to go across the road on to the defendant's land to look into his shop windows. The result of leaving open the sixteen feet two inches of the north side of the blue road running from the easterly point of that side may be to create a public right of way.

The plaintiff is entitled to a mandatory injunction for the removal of, at any rate, the overhanging portion of the pilaster. The right of eaves granted or reserved to the defendant does not entitle him to make or maintain an encroachment like this. Damages would not be a sufficient compensation to the plaintiff, and the Court has no jurisdiction to award them in lieu of an injunction.

The plaintiff is willing that a gate should be placed in the fence restored between the defendant's triangular piece of land and the blue road.

Romer, K.C., and *Herbert S. Preston*, for the defendant. When a right to use a road to or from any part of land of the grantee of the easement is granted, the grantor must be taken to have granted, as part of or incidental to the principal easement, the right to the grantee to come out on to the road at any part of the boundary between the road and his land: *Cooke* v. *Ingram.* (2) The principle on which the decision was founded is to be found in *Roberts* v. *Karr.* (3) The defendant can come on to the road from his own land at any point of the boundary, and is not bound to maintain any gate at any point of access, for such a gate would obstruct his free right of access.

The plaintiff, the owner of the servient tenement—that is to say, the blue road—is not entitled to put up a gate, either at the east end of that road, or anywhere along the north side of the road. A gate, whether locked or not, is an obstruction to a right of

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(1) (1852) 8 Ex. 187.

(2) (1893) 68 L. T. 671.

(3) (1809) 1 Taunt. 495.

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way, whether the right is a public or a private one. In *James* v. *Hayward* (1) the plaintiff's complaint was that the defendant had committed a trespass by breaking down a gate across a road. The defendant pleaded that the road was a highway going across the plaintiff's close. By a majority of the Court it was held that putting the gate across the highway was a nuisance and a hindrance to passengers, and Jones J. said that if it was an unlawful obstruction to put up a gate across a private way, a multo fortiori was it an unlawful obstruction to put up a gate across a highway. The ratio decidendi, at any rate, is in favour of the defendant's contention in the present case. In a dispute whether a road is a highway the putting up of a gate always shews an intention not to dedicate the road to the public.

[SARGANT J. Where it is a question of construction of a grant of a private way, that construction depends on the surrounding circumstances: *Cannon* v. *Villars*. (2)]

A gate must always create some obstruction; for instance, putting a gate across the entrance to a mews in London would cause the greatest inconvenience. If the grantor of a right of way wishes to have the right to put up gates, he must specially reserve that right to himself. A grant of a right of way like this does not mean the grant of a way to be used only through gates, but that the grantee and those claiming under him shall have the unrestricted right of using the road for the purpose of going to or returning from any part of the grantee's land: *South Metropolitan Cemetery Co.* v. *Eden*. (3) Where the way is only a footway and is a public one, the public have the right to the full length and breadth of the way: *Pullin* v. *Deffel*. (4)

The road of which the defendant was granted the right of user was to be ten feet wide, and it cannot be contended that he is entitled only to a convenient way of a shorter width: see *Harding* v. *Wilson*. (5)

Where there is a private right of way to a man's land, putting up a gate across it is a breach of a covenant for quiet enjoyment of the land to which the way leads: *Andrews* v. *Paradise*. (6) The plaintiff cannot, without committing a trespass, erect a fence on our land where the fence has been pulled down, and she cannot put a fence on the blue road adjoining without unlawfully diminishing the width of the road, all of which we are entitled to use.

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(1) W. Jo. 221.
(2) (1878) 8 Ch. D. 415, 420.
(3) (1855) 16 C. B. 42.
(4) (1891) 64 L. T. 134.
(5) (1823) 2 B. & C. 96.
(6) 8 Mod. 318.

Clifford v. *Hoare* (1) does not really help the plaintiff, as it only decides that on the construction of the deed in that case a reasonable use and enjoyment of an ascertained way was the subject of the grant. It certainly does not decide that a man who is entitled to a road forty feet wide can be compelled to take one only thirty-nine feet wide. It is difficult, if not impossible, to make out what was decided in *Hutton* v. *Hamboro.* (2) In *Henning* v. *Burnet* (3) there was clearly an obstruction. As regards the pilaster, the Court has jurisdiction to award damages instead of granting an injunction. By s. 2 of Lord Cairns' Act (the Chancery Amendment Act, 1858, 21 & 22 Vict. c. 27), "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction . . . . against the commission or continuance of any wrongful act . . . . it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction." Although that Act has been repealed by s. 4 of the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 5 of the Act of 1883 provides that "the repeal effected by this Act shall not affect . . . . any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired, or duty or liability imposed or incurred, or compensation secured by or under any enactment repealed by this Act." The repeal has not affected the jurisdiction of what is now the High Court of Justice, and Lord Cairns' Act is applicable whether the damage sustained is substantial or nominal: *Sayers* v. *Collyer*. (4) The exercise of the power to grant mandatory injunctions must be attended with the greatest caution, and is confined to cases where the injury to the plaintiff cannot be estimated and will not be sufficiently compensated by a pecuniary sum: *Isenberg* v. *East India House Estate Co.* (5) The discretion given by the Act is wide enough to authorize a judge to award damages where formerly he would have given an injunction, and may be exercised in vexatious and oppressive cases, where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief, and where the injury to the plaintiff is small and is capable of being estimated in money and can be adequately compensated by a small money payment: *Shelfer* v. *City of London Electric Lighting Co.* (1); *Colls* v. *Home and Colonial Stores.* (2) The defendant is quite willing to give undertakings which will protect the plaintiff from being hampered by the overhanging of the pilaster in any building operations which she is able and willing to embark on.

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(1) L. R. 9 C. P. 362.
(2) 2 F. & F. 218.
(3) 8 Ex. 187.
(4) (1884) 28 Ch. D. 103.
(5) (1863) 3 D. J. & S. 263.

Martelli, K.C., in reply. The encroachment by the overhanging of the pilaster is not a trivial matter. It would stop the plaintiff from building on part of what is her land, if she wished to build and could get rid of the right of way. This part of the case comes within the ruling of Lord Halsbury in *Shelfer* v. *City of London Electric Lighting Co.* (3), for, but for Lord Cairns' Act, the plaintiff would have been entitled to an injunction to restrain the continuance of the encroachment, and there is nothing to justify the Court in refusing to aid by injunction the legal right established. The real object of the defendant in removing the fence is to improve his frontage. He is in a similar position to that of a person who is on a highway for purposes other than its use as a highway: *Harrison* v. *Duke of Rutland* (4); *Hickman* v. *Maisey.* (5)

Andrews v. *Paradise* (6) is no authority that a gate is in itself an obstruction. That case was decided on demurrer, and as the declaration alleged obstruction, that fact was admitted, and no decision as to it could have been come to.

SARGANT J. Though fully two days of the Court have been occupied by the hearing of this action, I must say that, so far as the plaintiff is concerned, it seems to me a trumpery, a trivial, and perhaps I might say a petty action. The plaintiff is seeking to enforce alleged rights which are plainly of no value to her, but whose enforcement would cause great embarrassment to, and inflict considerable loss upon, the defendant. However, the plaintiff has claimed to have the action decided according to her strict legal rights, and I have no option but to give effect to that claim.

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(1) [1895] 1 Ch. 287, 311, 317, 322.

(2) [1904] A. C. 179, 192, 193.

(3) [1895] 1 Ch. 310, 311.

(4) [1893] 1 Q. B. 142.

(5) [1900] 1 Q. B. 752.

(6) 8 Mod. 318.

The plaintiff and the defendant are neighbours, and that relationship arose in the following way. [His Lordship described the property as it was when the defendant acquired it, the negotiation for the sale of No. 93, Charminster Road, and the land afterwards forming the blue road, and stated the effect of the conveyance to the plaintiff, and proceeded as follows:] I should remark, in passing from that conveyance, that the right of roadway was granted in as ample terms as could possibly be used, and, as Mr. Martelli practically acknowledged during the argument, gave the defendant the right to get from his land on the north on to the roadway at any point that he should from time to time desire, and was made expressly appurtenant to the whole land and to every part of it. [After deciding as a fact that the defendant had never promised to let the plaintiff put up a gate at the east end of the blue road, and stating the facts as to her having given notice to the tenant of No. 93, Charminster Road, and paved the road, and as to the plans of the defendant's new buildings, the giving up by the plaintiff of the small strip, the building of the shops and the nature of them so far as they fronted or adjoined the blue road, and the erection of the pilaster, the alteration of the blue bricks, the occurrences which led to the action, and the claim made by the plaintiff's pleading, his Lordship continued as follows:]

The first question raised by that claim is really the important question between the parties, and in determining that I shall practically dispose of the action. Is the plaintiff as a matter of strict right entitled to put a gate across the eastern end of the ten-foot road or blue road? In all these cases the construction of a grant of an easement must be made with reference to all the surrounding circumstances at the date of the grant: *Cannon* v. *Villars*. (1) I have therefore to inquire first whether there was anything in the circumstances which implied that the plaintiff was entitled to put a gate there, and then, assuming she had no such implied right to put up a gate, I have to deal with the question whether she has a right to put up a gate as an ordinary incident of property notwithstanding the existence of the right of way. On the first point, something was attempted to be made of the existence of the gates at the end of the four-foot path. That does not afford me any assistance, because the parties to the conveyance were stipulating for the use of a totally different roadway; they were going to have a much wider road—a road which was going to be used by horses and carts, and not a mere footway, and the defendant stipulated for the fullest rights of access over that roadway to any part of his property. At that time there were stables at the rear of the property. I think only a few horses were kept there, but it was quite conceivable that more of the land might be used for that purpose, and certainly it must have been expected that carts would come in and out. They were coming already along the yellow road from the north, and they would naturally come to and from the defendant's shop at No. 91, Charminster Road, as well as to the rear of the shops that were intended to be built on the defendant's land to the north, and I cannot see in the surrounding circumstances anything whatever from which to imply that the plaintiff was to have the right to erect a gate across the east end of the blue road. It is true that there were gates at the north end of the yellow road, leading to the Alma Road, but I should have thought that that fact was certainly not in favour of the presumed right to erect a gate at the east end of the blue road, because the existence of the gates at the end of the yellow road would prevent any possibility of a public right of way being acquired for the two roads combined.

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(1) 8 Ch. D. 415.

If that is so, and assuming that, prima facie, an unrestricted right of way was granted to the defendant without any surrounding circumstances from which I can infer a bargain that a gate should be erected across the east end of the blue road, is there, apart from bargain, a natural right in the owner of land, across which a right of way of this kind is granted, to put up a gate? On that question there is very little authority, but what there is

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seems to me to be against the alleged right. In the first place I have been referred to *James* v. *Hayward* (1), where it was laid down that the placing of a gate across a public right of way was an obstruction, the reason given being that the placing of a gate across a private right of way would be an obstruction, and therefore that, a fortiori, the placing of a gate across a public right of way was an obstruction. Therefore, so far as the ratio decidendi goes, that is a decision that the placing of a gate is an obstruction. Then there is a case of *Andrews* v. *Paradise* (2), where the placing of such a gate was held to be a breach of a covenant for quiet enjoyment, sufficient to found an action for damages. It is quite true, as Mr. Martelli has pointed out to me, that that case was decided on demurrer and therefore on an admission of the pleading of the plaintiff which was that the defendant erected a gate across the road by which the plaintiff's tenant was obstructed; and he has urged that, inasmuch as it was not there denied that there was an obstruction, no decision at all was given on the question whether the gate itself was an obstruction or not. But I do not think that is the true effect of the case. It seems to me that what was alleged, and what was not traversed for the purpose of demurrer, was that there was such an obstruction as ordinarily arises from the erection of a gate, and that the Court held that such an obstruction as ordinarily arises from the erection of a gate, though a gate which might be opened, was an obstruction amounting to a breach of the covenant for quiet enjoyment. Otherwise I cannot see why there was any need for argument in the case, because if an out and out obstruction was admitted there was an end of the defence to the claim for breach of the covenant. And, looking at the present case from the point of view of common sense, it seems to me that where carts were expected to come in, and were coming in at the yellow road, and more carts might be expected to come in over the blue road, a gate erected at the end of the latter road must be an obstruction. A man driving a horse would have to get down and open the gate, and would have to leave his horse while he opened and shut the gate, unless he happened to find somebody kind enough to do the thing for him. It is perfectly easy, if people want to reserve a right of putting a gate across a roadway, to do so. In my judgment, I am bound by the authorities, and, if there were no authority, I should feel at liberty to come to the conclusion, as a matter of practical common sense, that the placing of a gate across a roadway, over which a full and unrestricted right of egress and ingress has been given to the owner of adjoining land, is an interference with that easement, and an obstruction of it which the defendant is, in strict law, entitled to object to and have abated.

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(1) W. Jo. 221.

(2) 8 Mod. 318.

The next question is as to the erection of a fence along the space of sixteen feet two inches on the north side of the blue roadway, and next to the south side of the triangular strip of land which belongs to the defendant and was left open by him for the purpose of making the quarter-circle front to his shop on the north side of the roadway. I am not very much impressed by the argument of the defendant's counsel that the erection of this fence, about an inch and a half wide, will necessarily diminish to that extent the blue road. I think that is really a case of de minimis, and that there will be no substantial interference with the defendant's easement by the mere subtraction from the roadway of the space occupied by the fence. But I do think that it is an interference with his right to get to the roadway from any part of his land lying to the north of it. I will put this case: Supposing that along the frontage of his land further west, but parallel with the blue road, the defendant had erected some shops with windows displaying goods, and had left in front of the windows a vacant strip of land, six feet wide, to which people might come for the purpose of looking at the goods in the windows—I should have thought that he would then have had an undoubted right to insist that people should be allowed to come along the blue roadway on to his vacant strip of land for the purpose of looking into the windows and admiring the display of goods there, and this although they did not enter any shop, and although there was no doorway there by which they could enter; because the right of way is not merely to any buildings which the defendant may erect on his land, but a right of way to every part of his land marked on the plan, including the six-foot strip, which would be part of that land. I may say also that I think that along the south side of his land lying to the north of the blue roadway he might make an access, if necessary ten or twelve or fifteen feet wide, to stables or anything of that kind on his land, whereas all that he has done has been to throw back the front of his shop by means of this quarter-circle bow, with the result that he has left what in its full extent is some sixteen feet, but which for all practical purposes is only, I should think, eight or nine feet, more or less, of his frontage, unprotected from the blue roadway, so that persons coming to his shop, or coming from the triangular piece of land from which they have been admiring the display in his shop windows, may walk over the blue roadway and proceed on their way down Charminster Road or Richmond Park Road, as the case may be.

Is it an unreasonable use by the defendant of his right of way and access to every part of the frontage of his land from the blue roadway, which was expressly granted to him by the conveyance, that he should make provision for people doing that? In my judgment, it is not. I do not see why he should not use a portion of his frontage on that roadway for the purpose of making a place where people may stand to admire the goods in his shop window. It is a reasonable use of the easement in my judgment, and, if that is so, a fence erected on the sixteen feet of the easterly portion of the north side of the blue road would deprive him of that access to his triangular piece of land which was expressly bargained for in the deed of conveyance. Further than that, evidence was given that the defendant's assistants have from time to time to go round from the entrance in Charminster Road, pass over the triangular piece of land, and go along the blue roadway to the stores, shops, and offices in the rear. That frequently happens during the day, and of course the existence of the fence—without any gate in it—prevents their doing that and makes it necessary for them to come out on to the pavement of Charminster Road, and, in my judgment, it interferes with their reasonable access to, and the use of, the blue road.

Then it is said, "Oh, no, the plaintiff is willing that the fence along the sixteen feet frontage to the roadway shall not be continuous but that there shall be a gate in it." But, with regard to that case, the same objections, although to a smaller degree, apply as those which I have stated with regard to the question whether there should be a gate at the east end of the blue roadway. It is quite true that the gate is proposed to be used by foot passengers only, and therefore it would not be necessary to get out of a cart to open the gate, but still I think the gate would be a slight obstruction which the defendant would be entitled to have removed. But then it is said, "The result of having no such fence or gate would be to throw open to the public a part of this land, and after a time the public would or might gain rights over that land, and the privacy of the plaintiff with reference to this land might be impaired." Well, it may possibly be that if a person grants private rights to another person and to a number of persons through him, they cannot exercise those rights effectually without something being done which may end in the public securing rights. If so, so much the worse for the grantor. He has chosen to grant those private rights, and if public rights follow on them, that is the result of his grant being made without sufficient care. But I do not think that there is any real danger of anything of the sort arising, because the defendant seems to have been quite reasonable in the matter, and is—I asked Mr. Romer—perfectly willing that there should be either a certain kind of gate (the working of which I do not profess completely to understand), or that two or three standards should be put up along the sixteen feet frontage to the blue roadway, and that for one day in every year the plaintiff should be allowed to obstruct the public access to and across this piece of land, so that no public rights should be acquired. The defendant —certainly before action, though he has not offered since—was willing to allow this, and I understand that he would be willing even now to do so. Further, the defendant was willing, throughout, that there should be cross gates placed sixteen feet back at the pilaster which I have mentioned, so as absolutely to preserve the privacy of the blue roadway to the west of that point and prevent the possibility of any public rights being acquired. I may add that I do not find that the plaintiff, in her shop, has

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anything but a blank wall opposite the frontage, of sixteen feet two inches, to the blue road—I think I am right in saying that she has no doorway or anything of that kind there—and therefore I cannot see how the plaintiff will, under the circumstances I have mentioned, run any material risk whatever of any public rights being gained over this private roadway.

That disposes of what I consider the real questions in the action; but I have also to deal with the question as to the pilaster. With regard to that, the defendant has paid a sum of 5*l.* into Court in satisfaction of the damage, if any, inflicted on the plaintiff. Mr. Martelli has said that damages will not do, and that the plaintiff has an absolute right to prevent this continuing trespass—not by the projection of the base of the pilaster on to the roadway, because the pilaster has been cut away at the ground level so as only to project on the roadway to an extent variously estimated at an inch and five-eighths of an inch, and that Mr. Martelli admitted to be a matter de minimis—but by the projection, one foot eight inches or so, some twelve feet above the roadway. He says that this is a continuing trespass, that the plaintiff has an absolute right to have it removed, and that the Court has no discretion whatever, but is bound to grant a mandatory injunction to have it removed. In my judgment, that is not so now, though it may have been the case before Lord Cairns' Act. That Act was perfectly general in its terms, and allowed the Court of Chancery to grant damages in lieu of an injunction. The jurisdiction seems to me to be perfectly well settled, and on that I need only refer to the case of *Isenberg* v. *East India House Estate Co.* (1), where Lord Westbury dealt expressly with the point. If I have jurisdiction to award damages instead of granting an injunction—which I have no doubt I have—the question then is whether I ought, in my discretion, to exercise that jurisdiction. In *Shelfer* v. *City of London Electric Lighting Co.* (2) Lord Halsbury stated the circumstances in which it would be right for the Courts to exercise their discretion in a special manner. I will not read what Lord Halsbury said on that occasion, but, in my judgment, this is precisely the sort of case which he was contemplating when he said that the discretion of the Courts might be rightly used in the direction of alleviating the extreme hardship which might be caused by an injunction. In my judgment, extreme hardship would be caused to the defendant if a mandatory injunction were granted for the removal of this pilaster, for though much of it may be ornamental, some part of the projection, at any rate, is part of the main structure of the building, and I cannot see that any practical advantage could possibly be gained by the plaintiff by its removal except the satisfaction of a desire to enforce strict legal rights. With regard to this matter I asked Mr. Romer whether he was willing, on behalf of the defendant,—without prejudice to the defendant's right to object to the plaintiff building on account of the existence of the defendant's right of way and on account of the existence of the defendant's right of eaves—to undertake that the existence of all or any part of the projection below the eaves should not in any way be used by him to prevent the plaintiff or her successors in title, if she or they should be minded or inclined to build; and Mr. Romer was quite willing to give that undertaking on behalf of the defendant. That being so, I can, in my discretion, award the plaintiff damages in respect of the continuing trespass, in lieu of an injunction, and, in my judgment, the sum of *5l.* paid into Court is an ample amount of damage to be awarded to her. The sum of *5l.* was paid into Court with a denial of liability, and the rule with regard to such a case was altered by a rule made in August, 1913, and as altered it stands in this way, under Rules of the Supreme Court, 1883, Order XXII., r. 6: "A plaintiff who does not accept money paid into Court with a denial of liability but proceeds to trial and does not recover more than the sum paid into Court shall not be allowed his costs of the issues as to liability unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in." Therefore, prima facie, costs with regard to that issue are thrown on the plaintiff, and I cannot say that there are any reasonable grounds on which she could have refused to accept the sum paid in. Accordingly, I leave the costs of that issue to be dealt with as the rule directs—that is to say, I award them to the defendant.

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(1) 3 D. J. & S. 262.

(2) [1895] 1 Ch. 287, 311.

As to the question of the right of way, it seems to me that, on

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the strict view of the law which the plaintiff has invoked, she was wrong on the substantial issues involved, and I therefore dismiss the action with costs. I order the sum of 5*l.* to be paid out to the plaintiff, and it may be set off against the costs which she will have to pay. The defendant's undertaking will be embodied in the order.

Solicitors for plaintiff: *Tattersall & Son, Bournemouth.*
Solicitor for defendant: *Archibald H. Yeatman, Bournemouth.*

F. E.

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In re BRITISH UNION AND NATIONAL INSURANCE COMPANY, LIMITED.

[1913 B. 0110.]

Insurance—Life, Fire, and Accident—Life Assurance Deposit—Claimants thereon—Mutual Rights—Life Policy Holders—Annuitant—Fire and Accident Policy Holders—Life Department Creditors—General Creditors—Breach of Contract by Life Department—Annuity granted in Compromise of Claim for Damages—Policy—Superannuation Allowance—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 2, 3, 29, 30, 31, 32.

The statutory deposit forming part of the life assurance fund of a life, fire, and accident insurance company is by virtue of s. 3, sub-s. 2, of the Assurance Companies Act, 1909, a security for the life policy holders only. It is not a security for any other creditors of the life department, or for the policy holders of any other department such as fire or accident, but, subject to the claims of the life policy holders, it is general assets under s. 2, sub-s. 3.

Sect. 31, sub-s. (*d*), and s. 32, sub-s. (*c*), though exempting a company that has made the statutory deposit in respect of any class of assurance business, e.g., its life assurance business, from making a separate deposit in respect of its fire or accident insurance business under s. 2, sub-s. 4, and though enabling a fire or accident deposit to be transferred to the life department in the absence of a previous life assurance deposit, do not imply any charge on the life assurance deposit in favour of the fire or accident policy holders.

Sect. 30, sub-s. (*b*), must be confined to annuities granted in the ordinary course of the company's business. An annuity granted by way of compromise of a claim for damages against the company for breach of contract by the life department is not an annuity within s. 30, sub-s. (*b*), and the annuitant is not a policy holder.

Semble, a superannuation allowance not payable out of the special fund referred to in s. 29 may be an annuity within the Act.

PETITION.

This was a petition by the above company and its liquidator for the payment out of Court of a sum of 20,000*l.* deposited under the Life Assurance Companies Acts, 1870 to 1872.

The company was incorporated on November 24, 1909, under the Companies (Consolidation) Act, 1908, to carry on (inter alia) every kind of insurance business except employers' liability insurance business and to grant annuities of all kinds whether dependent upon human lives or otherwise.

On June 24, 1909, a sum of 20,000*l.* was paid into Court under the Life Assurance Companies Acts, 1870 to 1872, on the authority of an order of the Board of Trade dated June 9, 1909.

Shortly after its incorporation the company commenced to carry on life, fire, and accident insurance business besides general insurance business not falling within the five classes of business mentioned in the Assurance Companies Act, 1909.

Under r. 10 of the Board of Trade Rules of June 6, 1910, as to deposits (Statutory Rules and Orders, 1910, No. 566) the deposit fund was prima facie and in default of reason to the contrary to be treated and dealt with as having been made in respect of the life assurance business. These rules are set out in Bunyon on Life Assurance, 5th ed. p. 567, and Bunyon on Fire Insurance, 6th ed. App. A, p. lxiv.

During 1910 the company carried on the business of industrial life assurance as well as ordinary life assurance, but towards the end of 1910 it discontinued the former, and all industrial life policies had long since lapsed, been satisfied, or provided for.

On June 17, 1912, the company was wound up by extraordinary resolution and on July 2, 1912, a supervision order was made.

At the date of the liquidation there were only nine life policies outstanding. The claims on these were compromised and satisfied, eight with the sanction of the Court and the remaining one out of Court.

There were, however, 350 claimants on fire and accident policies. Their claims amounted to 37,160*l.* They were represented by the respondents the Jamaica Co-operative Fire and General Insurance Company, Limited, and they contended that their claims ought to be satisfied out of the deposit fund in priority to the general creditors.

There were also ninety general creditors. Their claims amounted to 13,680*l.* They were represented by R. Robinson & Co., Limited.

All outstanding debentures issued for cash had been paid off, and certain debentures issued within three months of the liquidation to secure existing debts, but for which no cash was paid, were admittedly void under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 212.

The only other claimants were the respondents Urch and his wife and their mortgagees. Urch and his wife claimed to be annuitants for the life of Urch in the following circumstances.

On the formation of the company Urch was employed as general manager and manager of the life department for seven years from January 1, 1910, at a salary of 1500*l.* and a commission under an agreement of November 6, 1909, adopted by the company after incorporation by an agreement of December 23, 1909. The agreement was terminable by the company on six months' notice and payment of two years' salary as liquidated damages. By an agreement of August 24, 1910, made between the company and Urch, Urch resigned the general managership and continued his managership of the life department only at a salary of 600*l.* and commission.

After the company had discontinued the industrial life assurance business negotiations took place with a view to Urch's retirement. He ultimately brought an action against the company for upwards of 3000*l.* damages for breaches of the employment agreements, non-payment of commission, and for breach of an alleged verbal agreement to pay him 250*l.* a year on retirement. This action was settled on the following terms (inter alia). "The defendant company to pay to the plaintiff an annuity at the rate of 240*l.* per annum from January 1, 1911, payable by equal monthly instalments during his life. The terms of the deed carrying out this arrangement to be similar to those contained in a deed which has already been engrossed for execution and which is initialled by the parties."

By this deed dated December 30, 1910, and made between the company and Urch, reciting that under the three employment agreements Urch was manager of the life department for seven years from January 1, 1910, at a salary of 600*l.* and commission and reciting that the business was being reorganized and as part of that reorganization Urch had agreed to retire from the post of manager of the life department and to deliver up the agreements to be cancelled in consideration of the company paying the annuity or sum of 240*l.* per annum as thereinafter mentioned, it was witnessed as follows:

1. Urch agreed to cancel and deliver up for cancelment the three agreements and released the company from all liability thereunder.

2. The company covenanted during Urch's life to pay his wife 240*l.* per annum by equal monthly instalments of 20*l.* on the last day of each calendar month, the first instalment to be paid on January 31, 1911, and in case his wife died in Urch's lifetime to pay the annuity or sum of 240*l.* by such monthly instalments to Urch.

3. In the event of his wife and/or Urch at any time desiring to sell the said annuity or sum of 240*l.* per annum the wife and/or Urch should in the first instance offer the same to the company for 1250*l.* cash, and if the company should not accept the same within twenty-one days of the offer the wife and/or Urch should be at liberty to sell the said annuity to any other person or company at such price and upon such terms as she and/or he should think fit.

4. Urch agreed that any life or other insurance business he was able to influence he would place with the company, and he would not place any such business with any other insurance company without first offering it to the company, and he would not act as agent for any insurance company other than the company, but nothing therein contained should operate to prevent him from accepting any official position other than that of agent with any other insurance company.

Urch and his wife claimed that the annuity granted by this deed constituted a charge on the deposit fund in priority to any claims other than life assurance claims, and that it ought to be valued according to Rule A of Sched. VI. of the Assurance Companies Act, 1909. This was in fact the only annuity that the company had ever granted, though it had included life annuity tables in its prospectuses.

The petition was presented on December 2, 1913, and asked that the costs of the petitioners and of the Board of Trade and the respondents might be taxed and that the charges upon the deposit fund and the taxed costs might be ascertained and paid and that the balance of the fund might be paid to the liquidator for distribution as part of the assets of the company.

Gore-Browne, K.C., and *Stamp*, for the petitioners. The first question is whether the fire and accident policy holders have any charge on the deposit fund assuming that all the life policy holders have been satisfied. The second question is whether the annuity granted to Urch and his wife is an annuity within the meaning of the 1909 Act so as to give them a prior claim on the deposit fund.

Hon. Frank Russell, K.C., and *Galbraith*, for the fire and accident policy holders. Subject to, if not concurrently with, the claims of the life policy holders (if any) the fire and accident policy holders are entitled to a charge on the deposit fund. To substantiate this point it is necessary to consider the Life Assurance Companies Acts, 1870 to 1872, and the decisions thereon.

The Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), provides shortly as follows. Sect. 3 provides that every company carrying on life assurance business in the United Kingdom shall deposit 20,000*l.* with the Accountant-General, the company receiving the income therefrom, and the deposit being returnable so soon as the company's life assurance fund accumulated out of premiums amounts to 40,000*l.*

Sect. 4 provides that in the case of a company transacting other business besides life assurance, "a separate account shall be kept" of all receipts in respect of the life assurance and annuity contracts, and the said receipts shall be carried to and form a separate fund to be called "the life assurance fund" and "such fund shall be as absolutely the security of the life policy and annuity holders" as though it belonged to a company carrying on no other business than life assurance, and shall not be liable for any contracts for which it would not have been liable had the company's business been only life assurance.

This section gives the life policy holders a charge on the life assurance fund, but not on the deposit fund. This is remedied by the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41). Sect. 1 provides that the deposit shall be deemed to be "part of the assets of the company" and until returned it shall be deemed to form "part of the life assurance fund" and shall be subject to s. 4 of the 1870 Act accordingly. The effect of that section was to give the life policy holders a security on the deposit fund as part of the life assurance fund: *In re Nelson & Co.* (1); *In re Nelson & Co.* (2) It could be paid out when their claims were satisfied—*In re Popular Life Assurance Co.* (3)—but not before: *Ex parte Scottish Economic Life Assurance Society* (4); *In re Life and Health Assurance Association.* (5) In other words it was a security for the policy holders on whose behalf it was deposited. Under the old Acts it was simply deposited for the life policy holders. There were no deposits for fire and accident insurance and the fire and accident policy holders had no charge on the deposit fund.

The position is altered by the Assurance Companies Act, 1909, which was passed on December 3, 1909, and came into operation on July 1, 1910.

Sect. 1 provides that the Act shall apply to all companies "established before or after the commencement of this Act" who carry on life assurance, fire insurance, accident insurance, employers' liability insurance, or bond investment business.

Sect. 2, sub-s. 1, provides that "every assurance company" shall deposit 20,000*l.* with the Paymaster-General. Sub-s. 2 provides that the interest on the deposit fund shall be paid to the company. Sub-s. 3 provides that the deposit shall be deemed to be "part of the assets" of the company. Sub-s. 4 provides that where a company carries on, or intends to carry on, assurance business of more than one class, a separate sum of 20,000*l.* shall be deposited as respects each class of business, and the deposit made in respect of any class of business "in respect of which a separate assurance fund is required to be kept" shall be deemed to form part of that fund, and all interest accruing on

(1) [1905] 1 Ch. 551, 566.
(2) (1906) 22 Times L. R. 406, 408; (1907) 24 Times L. R. 74.
(3) [1909] 1 Ch. 80, 85, 86.
(4) (1890) 45 Ch. D. 220.
(5) [1910] 1 Ch. 458, 462.

the deposit shall be carried to that fund. Sub-s. 6 authorizes the Board of Trade to make rules as to deposits.

Sect. 3, sub-s. 1, provides that in the case of an assurance company transacting more than one class of assurance business "a separate account shall be kept" of all receipts in respect of each class of assurance business, and the receipts in respect of each class of business shall be carried to and form "a separate assurance fund" with an appropriate name. Sub-s. 2 provides that a fund of any particular class "shall be as absolutely the security of the policy holders of that class" as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable.

Up to this point the Act requires a separate deposit and a separate fund as security for the policy holders of each class of business, but the stringency of this provision is subsequently modified as regards fire and accident insurance business.

Sect. 31, sub-s. (*d*), provides that it shall not be necessary to make a deposit in respect of fire insurance business where the company has made a deposit in respect of any other class of assurance business, and where a company, having made a deposit in respect of fire insurance business, commences to carry on life assurance business or employers' liability insurance business, the company may transfer the deposit so made to the account of that other business, and after such transfer the deposit shall be treated as if it had been made in respect of such other business. Sub-s. (*e*) provides that separate funds need not be kept in respect of fire insurance business.

Sect. 32, sub-ss. (*c*) and (*d*), contain similar provisions as to accident insurance business.

In the present case the company carried on life, fire, and accident business and only one deposit was necessary. This deposit though prima facie the security of the life policy holders (Board of Trade Rules, 1910, r. 10) must also, at all events when they are satisfied, form a security for the fire and accident policy holders, whose right to have the security of separate deposits under s. 2, sub-s. 4, is lost owing to the existence of the life assurance deposit, which is presumably considered a sufficient security for all three classes of policy holders. Any other construction of the Act and Rules leads to a strange result. Suppose a fire insurance company deposits 20,000*l.* That fund is clearly the security of its fire policy holders. The company then commences to carry on life assurance business. Unless it is prepared to deposit another 20,000*l.* it must transfer its fire deposit to the life business. But the object of this transfer is only for the benefit and protection of the life policy holders either concurrently with or in priority to the fire policy holders, and it is submitted that the fire policy holders are only deprived of their security to that extent, and not for the benefit of the general creditors. If this is so, the same result must follow where the company commences with life assurance and then takes up fire insurance or where it starts them simultaneously. The order in which the businesses are commenced is surely immaterial.

Again Urch has no charge on the deposit fund.

Sect. 29 provides that the expression "annuities on human life" does not include superannuation allowances.

Sect. 30 provides that where a company carries on life assurance business this Act shall apply "with respect to that business" subject to the following modifications :—(*b*) Where the company grant annuities upon human life, "policy" shall include the instrument evidencing the contract to pay "such an annuity," and "policy holder" includes annuitant.

Now Urch's annuity was not granted in the ordinary course of the company's business, i.e., in consideration of a payment to the life assurance fund. It was granted under a special contract in compromise of his action for damages. This is not within the purview of the Act and Urch is not a policy holder.

Micklem, K.C., and *Gerard M. Hildyard*, for the general creditors. As to Urch's claim we adopt the above argument, but on the main question we say that the fire and accident policy holders have no charge on the deposit fund. Under the Life Assurance Companies Acts, 1870 to 1872, the deposit fund formed part of the life assurance fund and was a security for the life policy holders. But it is clear from Sched. III. of the 1870 Act that it was also subject to establishment charges such as commission and expenses of management. Subject to those claims it was general assets of the company, and fire and accident policy holders had no special claim on it.

There is nothing in the Assurance Companies Act, 1909, to alter this position. Separate assurance funds and deposits are required for life, employers' liability, and bond investment insurance, but not for a temporary insurance such as fire or accident unless it is the only business. Each assurance fund and deposit is subject to its own liabilities under the various sections and schedules, and apart from those it is general assets.

In the present case the deposit fund must be treated as made in respect of the life assurance business (Board of Trade Rules, 1910, r. 10) and is consequently applicable only as part of the life assurance fund. There is nothing in the Act or Rules to give any policy holders other than life policy holders any charge on it. The authorities relied on by the fire and accident policy holders do not touch this point.

Sir Charles Macnaghten, K.C., and *Cababé*, for Urch and his wife. The annuity deed is a policy within s. 30 and it is not within s. 29, which only excludes superannuation allowances and annuities "payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade, or employment." That means superannuation allowances and annuities payable out of a special superannuation fund, which is a common feature in many large companies.

[ASTBURY J. I do not think the annuity was a superannuation allowance within s. 29, but it was not granted in the ordinary course of the company's business under s. 30.]

That is a mere matter of form. It does not affect the substance of the transaction. The annuity was granted in compromise of Urch's claim for 3000*l.* damages. If he had been paid the 3000*l.* he could have bought a larger annuity.

[ASTBURY J. In that case the purchase-money would have gone to the life assurance fund.]

Certainly. But the life assurance fund would have first been depleted to the same amount. Urch was the manager of the life department. His claim was for breach of contract by that department. His damages could not have been paid out of funds belonging to any other department. This is clear from s. 3, sub-s. 2, which provides that a fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, "and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

[Astbury J. Is not that a provision in favour of policy holders? For instance life policy holders can object to the life assurance fund being applied to purposes outside the life business. But is any such right given to the creditors of the life business, as against general creditors?]

It is given by implication. The life business creditors would prima facie have a right against all the funds. The section deprives them of all rights except against the life assurance fund. Surely they have a prior claim on that fund.

Harry Dobb, for the Urch mortgagees, adopted the same argument.

Rolt, for the holders of the void debentures, took no part in the argument.

Austen-Cartmell, for the Board of Trade. Rule 7 (*d*) provides for payment out of a deposit fund where the company has ceased to carry on either assurance business, or the particular class of business to the credit whereof the deposit fund (not being the sole deposit fund) is standing and all liabilities in respect of the deposit fund have been satisfied or provided for. The life policies and other liabilities attributable or apportionable to the life business ought to be paid out of the life assurance fund (including the deposit fund) pari passu, and any surplus is general assets. The Board of Trade have in fact never concerned themselves with any creditors other than policy holders of the particular class of business to the credit of which the deposit fund stands. The present question has never been raised.

Again Urch is no doubt an annuitant in the general sense, but he is not an annuitant or policy holder within s. 30, which obviously refers to annuities granted in the ordinary way in consideration of a payment to the life assurance fund. If this were not so, company could grant annuities in commutation of a fire insurance liability or any other liability, the annuity being payable out of the life assurance fund, but without any quid pro quo to that fund. Such a proposition is quite untenable. The company's liability to Urch was a general liability in damages, and could not have been discharged solely out of the life assurance fund. Urch is therefore simply a general creditor, and has no charge on the deposit fund.

Micklem, K.C., in reply.

Astbury J. (after stating the facts). It has been contended that the effect of the legislation, to which I will refer in a moment, is that, at all events after the life policy holders have been satisfied, the fire and accident policy holders have a security upon the deposit fund in priority to the ordinary creditors of the company. The ordinary creditors on the other hand contend that the policy holders have no such prior right.

By s. 3 of the Life Assurance Companies Act, 1870, it was provided that every company established after the passing of the Act for the purpose of carrying on the business of life assurance within the United Kingdom should be required to deposit the sum of 20,000*l.* as therein mentioned, and that no certificate of incorporation should be issued until the deposit should have been made, and that the return to the company of that deposit might be made so soon as its life assurance fund accumulated out of premiums should have amounted to 40,000*l.*

By s. 4 it was provided that: "In the case of a company established after the passing of this Act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance."

It is to be observed, I think, that in that section there is no provision making these receipts an exclusive security in favour of the policy holders as against the ordinary creditors of the company, or if the company carried on more than one class of business as against those of the ordinary creditors of the company whose debts had been incurred in connection with the carrying on of the life assurance business of the company, and Sched. III. makes it perfectly clear that the annual revenue account is to be debited with the amount of the assurance fund at the commencement of the year and all premiums, interest, dividends and other similar receipts and credited (inter alia) with payments for commission and expenses of management.

The only part of the Act of 1872 that I need refer to is s. 1, which provides that the deposit referred to in the last Act shall, upon the incorporation of the company, be deemed to have been made by and to be part of the assets of the company, and shall until the return to the company be deemed to form part of the life assurance fund of the company, and be subject to the provisions of s. 4 of the Act of 1870.

Under the Act of 1909, which repeals these two earlier Acts, s. 2, sub-s. 1, provides that every assurance company—it is no longer limited to life assurance companies—shall make this deposit. Sub-s. 3 provides that the deposit shall be deemed to have been made by and to be part of the assets of the company. Sub-s. 4 provides that: "Where a company carries on, or intends to carry on, assurance business of more than one class, a separate sum of 20,000*l.* shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund, and all interest accruing due on any such deposit or the securities in which it is for the time being invested shall be carried by the company to that fund."

By s. 31, sub-s. (*d*), it is provided that: "It shall not be necessary to make a deposit in respect of fire insurance business where the company"—as happens to be the case in the present case—"has made a deposit in respect of any other class of assurance business," and by s. 32, sub-s. (*c*), "It shall not be necessary to make or keep a deposit in respect of accident insurance business," in the same event, namely, "where the company has made a deposit in respect of any other class of assurance business."

Now s. 3, which is a mere extension of s. 4 of the Act of 1870, provides by sub-s. 1 that: "In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name"; and by sub-s. 2: "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

Now, up to this point I do not find anything in the 1909 Act apart from the extension of the obligation to make the deposit to all assurance companies giving any further security to policy holders than that given by the earlier Acts, even in the case of life policy holders, nor do I find any separate charges, rights, or priorities given to fire and accident policy holders in the cases where the company also carries on a life business, and has made its ordinary deposit. In the schedules to this Act appear the same features as are indicated in those of the earlier Acts, namely, that the ordinary costs and expenses of management are to be paid yearly out of the assurance fund.

In these circumstances, the question arises whether in this particular company the deposit of 20,000*l.* is under any provision of the 1909 Act primarily applicable in the events which have happened to the payment of the claims of the fire and accident policy holders, or whether it does not become part of the general assets of the company for the purpose of satisfying all its debts, there being no life policy claims now outstanding.

I have been referred to a number of authorities, but in none of them does it appear that the question involved in this petition was raised before the Court, namely, whether and to what extent the ordinary creditors of an insurance company can claim in competition with any one or other class of its policy holders.

In *In re Nelson & Co.* (1) Buckley J. says: "Again, s. 4 of the Life Assurance Companies Act, 1870, requires that a separate account shall be kept of all receipts in respect of the annuity contracts, and that the receipts shall be carried to and form a separate fund absolutely the security of the annuity-holders."

In *In re Nelson & Co.* (2), a case connected with the same company, Warrington J.—again not dealing with this point—says that "the true effect of s. 4 of the Life Assurance Companies Act, 1870, and s. 1 of the Act of 1872 was to make the deposit a statutory security for the fulfilment of the life assurance obligations of the company, so that, when the company entered into a life assurance or annuity contract, there was necessarily imported, as part of the conditions under which the company carried on its business, a provision that the life assurance fund should form a security for the fulfilment of the company's life assurance obligations. Under the Act of 1872 that would apply to the deposit, because by that Act the deposit was to be deemed to form part of the life assurance fund of the company. If the life assurance fund was the property of the policy-holders, the deposit also was. Contracts by the company with annuity-holders or pensioners were contracts conferring, by statute, a right to have the life assurance fund treated as absolutely the security of the life policy and annuity-holders,

(1) [1905] 1 Ch. 551, 566.

(2) 22 Times L. R. 406, 408.

and the life assurance fund could in consequence of the statutory provision be treated as assets of the company subject only to the claims of policy-holders."

In that case as in the previous case the learned judge was not considering any question as between the policy holders on the one hand and any particular body of creditors other than policy holders on the other hand.

In *In re Popular Life Assurance Co.* (1) Warrington J. again made certain observations which have been read to me, but in that case also the question now before me did not arise, and the same remark applies to *In re Life and Health Assurance Association* (2), a case under s. 7 of the Act of 1872.

The direct point that I have to decide, apart from Urch's claim, is whether, now that the life policy holders are satisfied, the claimants under the fire and accident policies are entitled to be paid out of the deposit fund in priority to the ordinary creditors of the company. In my judgment they are not.

In arriving at this conclusion I think it is necessary to appreciate as far as one can the general meaning and intent of the 1909 Act, which seems to me as far as this point is concerned to be as follows: No company is now, provided it carries on the business of life, fire, accident, or employers' liability insurance or bond investment business, to commence and carry on business without depositing 20,000*l*. If it carries on a life assurance business and has deposited this sum, it is not necessary that any further sum should be deposited in connection with the fire and accident insurance business which it may carry on either at the commencement or at any subsequent period in its history.

With regard to the life deposit fund which is made one with the accumulations of the life assurance premiums, there is a provision that the fund shall be kept separate from the other funds in connection with its other assurance business, and shall be as absolutely the security of the life policy holders as though it belonged to a company carrying on no other business than life assurance.

In this particular company the deposit, which had not to be repeated for its fire and accident business, had, I think, under the clauses of this Act to be kept with the premiums to a separate account, and out of those premiums the ordinary life expenses of management and commission expenses had to be paid.

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(1) [1909] 1 Ch. 80, 85, 86.

(2) [1910] 1 Ch. 458, 462.

I do not find anything in the Act which directly or indirectly provides that where a life assurance company which carries on other business has paid this deposit and has satisfied the claims of its life policy holders, the deposit fund or any part of it shall be subject to any prior claim or charge in favour of any other of its policy holders.

The next matter relates to Urch's claim, which is put on two grounds.

In the first place it is said, that this company being a company prepared to grant life annuities, although it had not done that class of business, the deed creating the annuity on the settlement of Urch's action is a policy within the meaning of s. 30, sub-s. (*b*), of the 1909 Act.

Sect. 30 provides that "Where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications," and sub-s. (*b*), which is an ordinary definition clause, provides that "Where the company grant annuities upon human life, 'policy' shall include the instrument evidencing the contract to pay such an annuity, and 'policy holder' includes annuitant." The section does not, however, say that every instrument creating an annuity granted by an insurance company is a policy, nor that every annuitant is a policy holder. What I think it means is this, that where the company in the ordinary course of its business does in fact grant annuities upon human life as part of its life assurance business, then the instrument used by it in granting such an annuity shall be a policy within the meaning of the Act, and the person entitled to such an annuity shall also be a policy holder. But it is to be observed that in those cases the consideration for the grant of the annuity would form part of the life annuity fund, and the persons entitled to be so regarded as policy holders would be confined, and I think ought to be confined, to those who have made the appropriate subscriptions to the life annuity fund of the company. If this were not so, an insurance company could, I think, largely evade its obligations under the

Act by granting annuities to creditors whether they were creditors under fire or accident policies or otherwise, in which case the distribution of their assets in due course would be prevented in the liquidation. In my judgment, although the point is not free from difficulty, I do not think that the deed creating this annuity in Urch's favour comes within the language, meaning, or intent of s. 30.

It was next contended that the liability under this annuity deed was a liability incurred by the company in connection with its life assurance business within the meaning of s. 3, sub-s. 2. At first sight this seemed a difficult point. At the time in question Urch was the manager of the life department and only of the life department of the company. His salary as such manager would be properly credited against the life assurance fund in the annual revenue account, and it is suggested that the compromise of his rights effected when the dispute arose between him and the company was a liability incurred in and in connection with the life business and as such was payable out of the fund made the special security of the life business within the meaning of the 1909 Act.

Sect. 3, sub-s. 2, provides that "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

If this is read absolutely strictly, divorced from any context in the Act, this fund could not now be applied at all, but I think the true meaning of the sub-section must be that e.g. the life assurance fund therein referred to is not to be liable as against the life policy holders, which is the matter the Act is dealing with, for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance, and is not to be applied directly or indirectly for any purposes other than those of the life assurance business. In other words the fire and accident claims are not to be paid out of the life assurance fund. I think the sub-section must mean that for the protection of the life policy holders the fund is not to be distributed or payable otherwise than in accordance with this provision, but I do not think that it was intended to give or that it gives to creditors, even creditors whose debts have been incurred solely in connection with the life department business, any prior right, charge, or lien upon this fund for their debts as against other creditors of the company after the life policy holders have been paid and satisfied.

I am told, but I do not decide the case upon this ground, that the Board of Trade in fact take a similar view, because in applications for repayment of the 20,000*l.* deposit, all that they concern themselves with is whether or not there are any outstanding policy holders, and they do not concern themselves with any particular class of non-policy creditors.

Further I think that Urch's claim, in compromise of which this annuity was granted, was a claim in the nature of general damages against the company, and not a claim limited to the life department, or the fund connected therewith.

The result is that there are now no creditors who have any prior claims upon this fund, and it must be paid out to the liquidator as general assets.

Solicitors : *Foss, Bilbrough, Plaskitt & Co.; Druces & Attlee; Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne; Ellis, Bickersteth, Aglionby & Hazel; Edwin E. Clark; Colyer & Colyer; Solicitor to Board of Trade.*

G. R. A.

WARRINGTON J.

1914

March 5.

In re JONES.

PEAK v. JONES.

[1913 J. 899.]

Administration—Executor—Insolvent Estate—Preferment of Creditors—Payment of Debts to Amount in Excess of Assets in Hand—Right of Executor to recoup himself out of Subsequent Assets.

To entitle an executor to insist on his right to prefer a creditor and to be allowed the amount paid by him out of the assets of the testator's estate, it is not necessary for him, in the event of the estate proving insolvent, to establish that at the time he made the payment he had assets of the testator in hand. He may if he pleases himself advance the money to the estate for the purpose of such payment, and if he does so he will be entitled to recoup himself out of subsequent assets of the estate which may come into his hands.

Hepworth v. *Heslop* (1849) 6 Hare, 561, discussed.

Point of law referred by the Master to the judge.

The Reverend William Richard Jones, late vicar of Hyssington with Snead, Church Stoke, Salop, who died on March 15, 1912, appointed his wife, Elizabeth Jones, sole executrix of his will.

The executrix duly proved the will on August 3, 1912.

On November 30, 1912, the plaintiff, who was the present incumbent of the benefice, obtained an order from the Bishop of Hereford, under s. 34 of the Ecclesiastical Dilapidations Act, 1871, for payment by the executrix of 455*l.* for dilapidations in respect of the buildings of the benefice.

On March 26, 1913, the plaintiff commenced the present action for the administration of the testator's estate, and on June 16, 1913, the usual judgment in a creditor's action directing accounts and inquiries was pronounced.

In prosecuting the accounts and inquiries before the Master in chambers it appeared that the property which the testator was possessed of or entitled to at his death consisted of (*a*) a sum of 2*l.* in cash; (*b*) certain household furniture, part of which had been sold prior to the commencement of the action and had realized 134*l.* 16*s.* 11*d.*, the furniture unsold being of the estimated value of 2*l.* 11*s.* 6*d.*; (*c*) a proportion of tithe and glebe rents due to the deceased at the time of his death amounting to 71*l*. 14*s*. 4*d*., of which 64*l*. 14*s*. 4*d*. had been received by the executrix prior to the commencement of the action, the residue of 7*l*. being outstanding; (*d*) a reversionary interest in the estate of the late Mary Jane James of the estimated value of 250*l*., and (*e*) certain live stock which had been sold before the commencement of the action for 19*l*. 18*s*., the total value of the assets amounting to 481*l*. 0*s*. 9*d*.

The executrix claimed to be allowed payments made by her for debts to the amount of 470*l*. 18*s*. 6*d*. prior to the administration order. The plaintiff's solicitors contended that, as the executrix had paid some of the debts to the amount of 249*l*. 9*s*. 3*d*. in excess of the assets which had come to her hands, she was not entitled to recoup herself out of the estate when received by her the full amount thereof, but would only be entitled to receive a dividend on the amount, the estate being insolvent, and in support of that contention they relied on *Hepworth* v. *Heslop*. (1) The Master, after argument, intimated that he did not consider that the case applied, and that he therefore proposed to allow the executrix her full payments in her account. The plaintiff's solicitors thereupon informed the Master that they wished to take the matter to the judge, and the Master gave them leave to do so subject to their agreeing to accept the judge's decision as final and not to carry the matter to the Court of Appeal. The matter was accordingly adjourned into Court at the plaintiff's request for argument.

P. F. S. Stokes, for the plaintiff. Although the executrix had, until the administration order was made, a right to prefer creditors, and, if she paid them out of her own money, to stand in their place, yet this right is a limited right, and only enabled her to prefer creditors to the extent of the value of the assets at the time of her making the preferential payment and to stand in their place to that extent. As the amount which the executrix paid to creditors exceeded the amount of the value of the assets in her hands when she made the preferential payments, it is submitted that she is only entitled in respect of such excess to prove and receive a dividend with the other creditors: *Hepworth* v. *Heslop.* (1) That case was cited in argument in *Spackman* v. *Holbrook* (2), but the particular point now arising for decision was not there considered. I do not rely on the latter case. There may have been assets there sufficient for what the executors did. At all events it is not, it is submitted, a decision against me. *Hepworth* v. *Heslop* (1) was again referred to in *Earl Vane* v. *Rigden* (3), when that case was before Malins V.-C., whose judgment is reported in a note to the case. The Vice-Chancellor there said that he was "inclined to concur in the principle which appears to have been acted on by Wigram V.-C. in *Hepworth* v. *Heslop* (1) where he draws a distinction between cases where the assets are in the hands of the executor and where they are not." That judgment was reversed on appeal, but the particular point now in question does not appear to have been dealt with on the appeal. *Hepworth* v. *Heslop* (1) is also referred to in Seton on Judgments, 7th ed. vol. ii. pp. 1368—9, and in Williams on Executors, 10th ed. vol. i. p. 782.

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(1) 6 Hare, 561.

The principles as to the executor's right of retainer are stated in *Talbot* v. *Frere.* (4) The right is limited to so much of the assets of his testator as comes into the possession or control of the executor, or is paid into Court during his lifetime: *In re Compton.* (5) It would therefore appear to follow that if an executor cannot retain he cannot prefer. [He also referred to *In re Samson.* (6)]

C. L. Coote, for the defendant. The only question is whether in order to entitle an executor to prefer a creditor it is necessary that he should have in his hands assets of the testator, and it is submitted that it is immaterial whether he has or has not. *Hepworth* v. *Heslop* (1) is not a clear decision on the point. The judgment of Wigram V.-C. in that case appears to have proceeded on the footing that the executor had assets in his hand when he made the payments, and that view is supported by the way in which the case is referred to by Malins V.-C. in *Earl Vane* v. *Rigden.* (3) The case is referred to in Williams on

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(1) 6 Hare, 561.

(2) (1860) 2 Giff. 198, 199.

(3) (1870) L. R. 5 Ch. 663, 665, n.

(4) (1878) 9 Ch. D. 568.

(5) (1885) 30 Ch. D. 15.

(6) [1906] 2 Ch. 584.

Executors, 10th ed. vol. i. p. 782, in a note without comment and no proposition of law is founded on it in the text. In *Earl Vane* v. *Rigden* (1) Lord Hatherley speaks of the executrix "not having the assets in hand," by which, it is submitted, he must mean liquid assets, such as cash, for there were assets there, namely, book debts, which the executrix had mortgaged. That case has found its way into Seton on Judgments from the fourth edition onwards as an authority for the proposition that it is immaterial whether the assets are in the hands of the executor or not. In *Spackman* v. *Holbrook* (2) the principle is laid down in the widest possible terms that where, on taking an account, a balance is found due to the executor for money advanced (the estate being insolvent) the executor is entitled to be paid in full, in priority to the creditors. The case is by mistake referred to in Williams on Executors, 10th ed. vol. ii. at p. 1508, as *Spackman* v. *Holland*.

[He was stopped.]

Warrington J. This is a question referred to me from chambers for the purpose of obtaining the direction of the Court as to whether the Master ought to allow certain payments to the executrix. The payments in question are payments made by the executrix in discharge of debts of the testator. At first sight and as thus stated it seems obvious that such payments ought to be allowed to her. The estate, however, is insolvent, and it is said that these payments were made by her at a time when she had no assets of the testator out of which she could make them, and that she cannot therefore be allowed them in full, but can only stand in the place of the creditors and receive the dividend which they would receive if they had not been paid in full.

The question, therefore, is whether in order to entitle the executrix to insist on her right to prefer creditors and to be allowed the amount due she must, if the estate is insolvent, establish that at the time she made the payment she had assets of the testator in hand.

The facts are these: The assets of the testator consisted of a small sum of cash, some tithe owing to him, certain chattels and farming stock. He was also entitled to an interest in reversion in the estate of a deceased person which has now fallen in. The amount paid by the executrix in respect of debts exceeds the value of the cash, tithe, and the farming stock of the testator. Those are all the material facts.

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(1) L. R. 5 Ch. 663, 668.

(2) 2 Giff. 198, 199.

The unpaid creditors say that the executrix cannot be allowed sums so paid in full and rely entirely on the decision of Wigram V.-C. in *Hepworth* v. *Heslop.*(1) In that case there were rather elaborate transactions in which the executor had indulged, but when threshed out the case resolved itself into one of preferring certain creditors. The Vice-Chancellor thought that it was important for the executor to establish that at the time the transaction amounting to payment took place he had in hand either cash or tangible assets which could be dealt with as cash. He entered into a somewhat elaborate discussion of the question whether the executor had cash in hand, and was not satisfied that he had. He then went on to say: "Assuming, however, that the executor, if he had not cash, had the wines and stock in trade of the testator, of a value more than sufficient for the satisfaction of these debts, the question arises, whether such possession of assets is sufficient to enable the executor to treat these transactions as payments of the bonds in question: I confess I cannot in principle distinguish goods from cash, or one species of assets in hand from another. The executor might have handed over and received back either one or the other, and the legal effect would have been the same. Can the omission of such a form make any substantial difference in the effect of the transaction? I think not. The testator's estate is in fact discharged in either case. I have assumed that assets, either in goods or cash, were in the hands of the executor when he procured the discharge of the bonds. If this be not admitted to have been the fact, the case must be referred back to the Master to ascertain the truth of the case in this respect." The Vice-Chancellor appears to have decided the case on the assumption that the executor had assets which he might have handed over in discharge of debts.

The executor has an absolute right to dispose of the assets of

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(1) 6 Hare, 561, 569.

WARRINGTON J.
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his testator by sale, pledge, or mortgage for the purpose of obtaining money to pay debts. The executrix here could have disposed of the reversionary interest in any of the ways mentioned and so have obtained money to pay the debts. She could have transferred the reversionary interest to the creditors in question in discharge of their debts. That is shewn by *Earl Vane* v. *Rigden* (1), in which it was held that an assignment by an executor to a creditor of all book debts of the testator by way of mortgage in order that he might pay himself out of the proceeds and account to the executor for the balance was a good preference. If the executrix here could do that I fail to see why she should not herself advance money to the estate for the purpose of paying the debts, looking to the estate to repay her when the reversionary interest fell in.

I think, therefore, that, regarding the payment as an advance to the estate, I must treat the executrix as having had assets at the time in her hands and therefore as being in a position to prefer creditors.

In my judgment, therefore, the Master ought to allow to the executrix in full the payments made by her for debts of the testator.

Solicitors: *Crosse & Sons, for Clark & Co., Ludlow; Helder, Roberts, Walton & Giles, for F. Treasure, Gloucester.*

W. I. C.

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(1) L. R. 5 Ch. 663.

C. A.
1914
March 3.

VON HELLFELD *v.* E. RECHNITZER AND MAYER FRÈRES & CO.

[1914 V. 34.]

Praiccte—Foreign Firm—Suing in Firm's Name—Service out of the Jurisdiction—Rules of the Supreme Court, Order XLVIIIA, *r.* 1.

A writ was issued by the plaintiff, who was a foreigner carrying on business in England, against E. R., a foreigner carrying on business in England, and Mayer Frères & Co., a French firm carrying on business in Paris, consisting of three partners all domiciled in Paris, and having no place of business in England, who were sued in the firm name. The writ asked for cancellation of an agreement, and was served upon E. R. in England. Liberty to issue a concurrent writ and serve notice of it out of the jurisdiction on Mayer Frères & Co. was granted, and they were duly served in Paris at the principal place of business of the firm:—

Held (affirming the decision of Astbury J.), that the proceedings must be set aside, so far as they affected Mayer Frères & Co., on the ground that there was no power to sue a foreign partnership, not carrying on business in England, under its firm name, in the absence of evidence that by French law a partnership was a different legal entity from the individual partners.

Appeal from a decision of Astbury J.

The plaintiff, Baron Alfred von Hellfeld, who was a foreigner carrying on business in England, issued a writ againt Ernest Rechnitzer (carrying on business in England as Rechnitzer & Co.) and Mayer Frères & Co. claiming: "(1.) A declaration that the agreement made between the plaintiff of the one part and the defendants of the other part dated December 20, 1913, as varied by a letter dated December 31, 1913, addressed and given in pursuance thereof to the Banque de Reports de Fonds Publics et de Depots Anvers was obtained by the fraudulent misrepresentation of the defendants. (2.) Cancellation and delivery up of the said agreement and letter. (3.) An injunction restraining the defendants their servants and/or agents from parting with or in any way dealing with the same and/or taking proceedings thereon and from interfering in any way with the fund or moneys therein referred to belonging to the plaintiff and in the hands of the said Banque de Reports de Fonds Publics et de Depots."

The defendant Rechnitzer was served in England.

On January 20, 1914, an order was made that a concurrent writ should be issued with liberty to serve notice of it on the defendants Mayer Frères & Co. at Paris in the Republic of France.

Mr. P. B. Lammin, a solicitor of Paris, representing the plaintiff, gave evidence that he "did on the 21st day of January, 1914, at 103, Rue des Petits Champs, Paris, in the Republic of France, being the principal place of business of the above named defendant partnership Mayer Frères & Co., personally serve the person having at the time of such service the control or management of the said partnership business there, with a notice of the concurrent writ of summons in this action."

On February 6, 1914, Mayer Frères & Co. moved before Astbury J. to discharge the order of January 20, 1914, and to set aside the writ and the service thereof upon them, and all subsequent proceedings in the action so far as they were thereby affected, on the ground that they were a partnership firm carrying on business without the jurisdiction of the Court, and all the partners of the said firm, namely, Charles Mayer, Paul Mayer, and Michael Mayer, were resident out of the said jurisdiction, and by reason thereof there was no jurisdiction to sue the firm in the firm name.

Astbury J. made an order discharging the order of January 20, 1914, and setting aside all the proceedings so far as they affected Mayer Frères & Co.

The plaintiff appealed.

There was evidence by Henri Mesnil, an expert in French law, as follows :—

"(2.) I say that on the assumption that the firm Mayer Frères & Co. consists of Charles Mayer, Paul Mayer and Michael Mayer carrying on business in partnership or société en nom collectif as alleged in paragraph 1 of the affidavit of Archibald William Stirling, by the law of France the defendants Mayer Frères & Co. having entered into the contract of the 20th December, 1913, in their firm name and not in the names of the individual partners, proceedings to have such contract set aside are properly commenced against the said defendants in their firm name. By the law of France a partnership or société en nom collectif is for the purpose of service of legal proceedings a distinct person at law from the individuals who constitute the firm, and the firm as distinct from the individuals who constitute it is bound by a contract made in the firm name. In a case such as the present where a contract is made in the name of the firm legal proceedings either to enforce such contract or to have it rescinded ought properly to be commenced against the firm in the firm name and not in the name of the individual partners.

"(3.) I further say that having read the affidavits of the said Percy Belasyse Lammin and assuming that notice of the writ in this action and the notice of motion of the 20th January, 1914, were served upon Mayer Frères & Co. at the place stated in such affidavits being their principal place of business such service would by the law of France be good service upon the firm in proceedings taken against the firm in the firm name and that by the law of France both the firm and the individual partners would be bound by proceedings so commenced and served."

C. A. Bennett, for the appellant. The service of notice of the writ out of the jurisdiction was quite regular and the proceedings ought not to have been set aside. By the law of France the firm is the entity liable to be sued, not the members of the firm. The position of a firm is analogous to that of a corporation, and service according to the law of the domicil is good service in this country. Actions by or against firms are regulated by Rules of the Supreme Court, Order XLVIIIA, and partners can be sued in the name of the firm where they are carrying on business within the jurisdiction. In France the plaintiff could recover judgment against the firm. If relief is asked against the members of a firm they must be sued individually, but here the relief sought is against the firm. By the law of France the firm is a separate legal entity and is liable to be sued. Service on foreign corporations may be effected in their own country according to the law of the domicil: Order IX., r. 8; Annual Practice, 1914, p. 63. The form of the affidavit of service in this case is that given as No. 3 in Appendix B, Part I. By art. 1 of the Convention with France—Lindley on Companies, 6th ed. vol. ii. p. 1227—"The High Contracting Parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorized in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals whether for the purpose of bringing an action, or for defending the same, throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions." We cannot be compelled to sue in a way which would be wrong in their own country.

[BUCKLEY L.J. In *Dobson* v. *Festi, Rasini & Co.* (1) the precise point was decided against you.]

There is evidence of foreign law here which was not before the Court in that case. It was a question under Order IX., r. 6, and the Court followed *Western National Bank of New York* v. *Perez, Triana & Co.* (2) and *Chatenay* v. *Brazilian Submarine Telegraph Co.* (3)

Jenkins, K.C., and *W. F. Swords*, for the respondents. There is not sufficient evidence to shew that French law is different from English law on this point. To succeed the plaintiff must shew that this firm is equivalent to a corporation, and he has not done so. This is a question of lex fori. The original rules, Order IX., r. 6, and Order XVI., r. 14, were quite general in their terms and provided that a firm could be sued in its own name. In *Dobson* v. *Festi, Rasini & Co.* (1) it was held that that did not apply to a foreign firm, and that decision is not touched by Order XLVIIIA, r. 1.

C. A. Bennett in reply referred to *Sadler* v. *Whiteman.* (4)

BUCKLEY L.J. In this action the plaintiff sues the defendants for relief consisting in a declaration that an agreement contained in a document of December 20, 1913, to which the defendants were parties, as varied by a letter, was obtained by the fraudulent misrepresentation of the defendants, and for cancellation and delivery up of the agreement and letter. The first defendant upon the record is within the jurisdiction. The second defendant upon the record is outside the jurisdiction. The cause of action is

(1) [1891] 2 Q. B. 92.
(2) [1891] 1 Q. B. 304.
(3) [1891] 1 Q. B. 79.
(4) [1910] 1 K. B. 868, 889.

one in which the second defendant must be joined, and therefore obviously it was a case for leave to be given to serve the writ out of the jurisdiction. The question that arises is this. The second defendant is described on the record as "Mayer Frères & Co." We are told (we have not seen the agreement) that in that name those defendants signed the agreement in question, and I take that to be the fact. Leave was given to serve the writ out of the jurisdiction, and service was made in Paris by one Lammin. The date of the writ was January 14, 1914; leave was given on January 20, and on January 21 the service was effected thus: "I did on the 21st January, 1914, at 103, Rue des Petits-Champs, Paris, in the Republic of France, being the principal place of business of the above-named defendant partnership Mayer Frères & Co., personally serve the person having at the time of such service the control or management of the said partnership business there, with a notice of the concurrent writ of summons in this action," and so on. On January 28 a notice of motion was given to set aside the order for leave to serve notice out of the jurisdiction, and the service of the writ, and the proceedings taken under it. That came before the learned judge, Astbury J., who made an order to set aside the order of January 20 and the service of the writ. The question before us is whether that is right.

Now it is proved that this firm of Mayer Frères & Co. is a French firm consisting of three persons, Charles Mayer, Paul Mayer, and Michael Mayer, and that they do not carry on business within this jurisdiction. Under those circumstances are they rightly sued as "Mayer Frères & Co." and have the order giving leave to serve them out of the jurisdiction and the consequent service been properly made? In my opinion they have not. It is familiar that by Order XLVIIIA provision is made that any two or more persons claiming or being liable as co-partners, and carrying on business within the jurisdiction, may be sued in the name of the firm and so forth; this firm is not within that rule. All these matters as regards the form and the service of the writ are matters of procedure governed by the rules and practice of this Court under the Judicature Act, and the whole question for investigation is whether or not it is right in these proceedings to sue these three gentlemen, Charles, Paul, and Michael, under their firm name of "Mayer Frères & Co."; and whether under that firm name there can be given leave to serve them, and whether they can be served. The language of the rule does not authorize it. The language of the rule is to the contrary. It can only be done if they are carrying on business within the jurisdiction, which these gentlemen are not. Prima facie therefore it is wrong. What is proved by the affidavit of H. Mesnil as regards the firm of Mayer Frères & Co. is that in France by the law of France a partnership or société en nom collectif is for the purpose of service of legal proceedings a distinct person at law from the individuals who constitute the firm, and from that passage it is sought to evolve the proposition that as a matter of law it is proved that in France, according to French law, a partnership is a totally different legal entity, although it be not so according to our law. I do not think that the evidence is sufficient to prove that, and the last words of paragraph 3 of the affidavit seem to shew that the deponent did not mean to say that that was so. But I do not found myself upon that, for I am not clear what the law of France is. According to the law of England, the firm of Mayer Frères & Co. is not a separate legal entity. According to our law it can be only a name descriptive of Charles, Paul, and Michael Mayer, and although if that firm were an English firm or a foreign firm carrying on business here the plaintiff could describe them with brevity by that name, yet after all he would still, according to our procedure and our rules, be taken as having included under that name the three natural persons, Charles, Paul, and Michael. The rules do not enable him so to describe them when they are a foreign firm, and there is nothing in the rules to relieve him, whether it be an English or a foreign firm, from taking such steps as that he is suing the three persons Charles, Paul, and Michael. If it were an English firm he could describe them by the abbreviation, but a foreign firm he cannot. Under those circumstances it seems to me that the writ is wrongly framed. I am not going to suggest the amendment which ought to be made, but it appears to me that as the writ stands it is not a writ which was properly issued, according to our procedure, to sue the persons whom it is sought to pursue; it is not such a writ as can be the subject of leave to serve out of the jurisdiction, and I think it necessarily follows that the service which has been made was erroneous.

Under these circumstances it seems to me that the order made below was quite right, and that this appeal must be dismissed.

PHILLIMORE L.J. I am of the same opinion. According to our modern practice there are three classes who can sue, or appear to writs,—persons, corporations, and firms. The introduction of partnerships is comparatively modern and since the Judicature Act, but the fact is merely for convenience of nomenclature and of service; the results are in the end the same as if the individuals composing them sued or were sued by their individual names. It is clear from the case of *Dobson* v. *Festi, Rasini & Co.* (1) that some similar procedure now obtains in Italy, and it appears from this case that some similar procedure now exists in France. That may well be, but our law, being very careful how it interferes with the rights of foreigners, has not allowed service to be effected upon individuals who are engaged in a foreign partnership by serving the partnership as in England. The foreign partners cannot be sued by their firm name, and there is nothing to enable service upon some manager carrying on business for the partners or service on one as service on the rest. Lindley L.J. goes so far as to say that "it would be monstrous to allow a plaintiff, after serving only one member of a foreign firm, to obtain by default a judgment which would bind all the partners." A very thin line distinguishes this present case from the one I have just alluded to. There are one or two passages in the affidavit of the French lawyer which are not exactly like the statement and go a little further than the statement of the Italian law as it appears in the report. They are not enough for this purpose; they are not enough to shew—which is necessary for this purpose—that a société en nom collectif is like a corporation in this respect, not merely that it has a separate persona, but that it has a separate ownership of property and separate liability from the ownership or liability

(1) [1891] 2 Q. B. 92, 95.

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by or of the persons composing the aggregation. I can conceive certain cases of bodies of which one might be doubtful whether they were corporations or not; and upon a writ properly framed alleging that the body sued was a separate entity, and making it clear that no relief was sought against any individual composing that entity any more than it would be against shareholders in a corporation, I can conceive it being possible to suggest that such a body might be treated as a corporation and might be sued and served as a corporation. But this is on the face of it apparently a partnership, and the affidavit of service of the writ plainly and boldly describes it as a partnership. The rules of English law provide that our ancient process in respect of English people should remain in respect of foreigners.

For these reasons I agree that the appeal should be dismissed.

Solicitors: *Woodthorpe, Browne & Co.; Maddison, Stirling, Humm & Davies.*

H. C. R.

Dictum of SARGANT, J., at p. 769, *applied.* *Re* ISLE OF THANET ELECTRIC SUPPLY CO., LTD. [1949] 2 All E.R. 1060.

Applied. In re ISLE OF THANET ELECTRICITY SUPPLY CO. [1950] 1 Ch. 161

In re NATIONAL TELEPHONE COMPANY.

SARGANT J.
1913
July 15, 16.

[00140 of 1912.]

Company—Winding-up—Surplus Assets—Preference Shares—Dividend at stated Percentage—Amount of paid-up Capital to be returned—Claim to further Share of Surplus—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 186.

Either with regard to dividend payable while a company is a going concern, or with regard to rights in a winding-up, the express gift or attachment to preference shares, on their creation, of preferential rights, whether in respect of dividend or return of capital, is, prima facie, a definition of the whole of their rights in these respects, and negatives any further or other right to which, but for the specified rights, they would have been entitled.

Articles of association of a company entitled the holders of its first preference shares "to receive a preferential cumulative dividend of 6 per cent. per annum, and no more, on the amount for the time being paid up . . . . thereon, out of the profits of the company, and to the preferential repayment of the amount paid up . . . . on any such shares, out of the assets of the company in the event of the company being wound up . . . . in priority to any payment in respect of the ordinary shares of the company, but to no other participation in profits."

Second preference shares were created, on an increase of capital, by

SARGANT J.
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NATIONAL TELEPHONE COMPANY, *In re.*

resolution which provided that "the holders thereof (subject to the payment of the preferential dividend on the original preference shares)" should "be entitled to a cumulative preferential dividend at the rate of 6 per cent. per annum," and that, after the ordinary shares had received 6 per cent. per annum out of the profits of each year, "the second preference shares and the ordinary shares shall participate rateably, according to the amounts paid up thereon, in any surplus profits." The resolution also provided that "in the event of the company being wound up, the surplus assets thereof shall be applied in the first place in repaying to the holders of the original preference shares the full amount paid up thereon, and, subject thereto, in repaying to the holders of the second preference shares the full amount paid up thereon, in priority to any payment in respect of the ordinary shares."

After the first and second preference shares had been issued the company adopted a new set of articles, one of which provided that if on winding up the "surplus assets shall be more than sufficient to repay the whole of the paid-up capital, then, subject as to any new shares to the special terms upon which they may be issued, the excess shall be distributed among the members in proportion to the capital paid . . . . on the shares, other than first and second preference shares held by them respectively, at the commencement of the winding-up . . . . But this clause is to be without prejudice to the rights of the holders of the first and second preference shares, and any other shares issued upon special conditions."

After the adoption of the new articles a number of unissued ordinary shares were (pursuant to a resolution) issued upon the terms that the holders should "be entitled to a non-cumulative dividend at the rate of 5 per cent. per annum on the amount paid up thereon," and that, "in the event of the winding up of the company," the surplus assets thereof should be applied first in repaying to the holders of the first and second preference shares the full amount paid up thereon, and that "such surplus assets shall next be applied in repaying to the holders of the third preference shares . . . . the full amount paid up thereon."

The remaining ordinary shares were issued on the terms that when fully paid they should be converted into two classes of stock, of which one, called "preferred stock," was, as between the two classes, to carry a fixed cumulative dividend of 6 per cent. per annum on the capital paid up thereon, and in the event of winding up was to rank for repayment of capital, together with a bonus of 5 per cent., in priority to the other class, called "the deferred stock," and that the deferred stock was to "confer a right to the surplus profits, and, in the event of a winding-up, to the surplus assets of the company to which the ordinary shares would, but for the said conversion, have been entitled."

In the voluntary winding-up of the company, after satisfaction of its liabilities, and repayment to all the share and stock holders of the capital paid up by them, and payment to the preferred stockholders of their 5 per cent. bonus, there remained for distribution a surplus consisting of the remains of a reserve fund which had not been capitalized, and which, while the company was a going concern, might have been distributed as dividend:—

Held, that the claims of the first, second, and third preference shareholders had been satisfied by the return to them of their paid-up capital, inasmuch as in each case there was an implied negativing of any right to receive more than their dividend at the specified rate up to the winding-up, and a return of their paid-up capital on winding up; that the preferred stockholders' claims had also been fully satisfied; and that the deferred stockholders were entitled to the whole of the fund.

THE National Telephone Company, Limited, was incorporated in the year 1881, under the Companies Acts, 1862 to 1880, as a company limited by shares.

Clause 5 of the company's memorandum of association stated that "the capital of the company is 600,000*l.*, divided into 15,000 preference shares of 10*l.* each and 90,000 ordinary shares of 5*l.* each"; but the rights attaching to the preference shares were not stated in the memorandum of association.

Clause 33 of the original articles of association of the company provided as follows: "Of the original capital, 90,000 shares, numbered 1 to 90,000 inclusive, shall be issued as ordinary shares; and 15,000 shares, numbered 90,001 to 105,000 inclusive, shall be issued as preference shares, entitling the holder to receive a preferential cumulative dividend of 6 per cent. per annum, and no more, on the amount for the time being paid up, or credited as paid up, thereon, out of the profits of the company, and to the preferential repayment of the amount paid up, or credited as paid up, on such shares, out of the assets of the company in the event of the company being wound up, or any final distribution of the assets, in priority to any payment in respect of the ordinary shares of the company, but to no other participation in profits."

Clause 34 of the articles gave power to increase the share capital of the company by the issue of new shares, which might be "either with or without preference or priority as regards dividends, distribution of assets, or otherwise, over any other shares, but so that no such preference or priority should affect the original preference shares."

On August 11, 1885, the capital was increased by the creation of 15,000 preference shares of 10*l.*, this increase being effected

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by a resolution, which was as follows: "That the capital of the company be increased by the issue of 15,000 new shares of 10*l.* each. That such shares be called second preference shares, and that the holders thereof (subject to the payment of the preferential dividend of the original preference shares) be entitled to a cumulative preferential dividend at the rate of 6 per cent. per annum. After the ordinary shares have received a dividend at the rate of 6 per cent. per annum out of the profits of each year, the second preference shares and the ordinary shares shall participate rateably, according to the amounts paid up thereon, in any surplus profits. The second preference shares shall not confer any right of voting at any general meeting of the company, and, in the event of the company being wound up, the surplus assets thereof shall be applied in the first place in repaying to the holders of the original preference shares the full amount paid up thereon, and, subject thereto, in repaying to the holders of the second preference shares the full amount paid up thereon, in priority to any payment in respect of the ordinary shares of the company."

Some time after the issue of the second preference shares the company was amalgamated with other companies, and the company by special resolution adopted fresh articles of association which, so far as material, were as follows:—

"3. The capital of the company, until increased or reduced, shall consist of 6,000,000*l.*, of which 15,000 shares of 10*l.* each shall be first preference shares; 15,000 shares of 10*l.* each second preference shares; and 1,140,000 shares of 5*l.* each (in so far as they shall not be issued with any preference under the powers hereinafter contained) ordinary shares.

"4. The first preference shares shall entitle the holder to receive a preferential cumulative dividend of 6 per cent. per annum, and no more, on the amount for the time being paid up or credited as paid up thereon, out of the profits of the company, and to the repayment of the amount paid up or credited as paid up on such shares out of the assets of the company in the event of the company being wound up, or any final distribution of the assets, in priority to any payments in respect of the other shares, but to no other participation in profits. The second preference shares shall entitle the holders (subject to the payment of the preferential dividend on the first preference shares) to a cumulative preferential dividend at the rate of 6 per cent. per annum. After the ordinary shares have received a dividend at the rate of 6 per cent. per annum out of the profits of each year, and after payment of any dividend, preferential to the dividends on any ordinary shares, which may be attached to a share under the powers herein contained, the second preference shares and the ordinary shares shall participate rateably, according to the amounts paid up thereon, in any surplus profits. In the event of the company being wound up, the surplus assets thereof shall be applied (after repaying to the holders of the first preference shares the full amount paid up thereon) in repaying to the holders of the second preference shares the full amount paid up thereon in priority to any payment in respect of the ordinary shares of the company.

"5. The shares of the company may," subject to certain agreements as to shares being allotted to certain persons, "be allotted or otherwise disposed of, to such persons, and for such consideration, and, subject to the priorities fixed by these articles, with such preference or priority as to dividends or on a distribution of assets, or otherwise upon such terms and conditions as the board may determine."

"43. The board may from time to time increase the capital of the company by the issue of new shares," but beyond a certain amount only with the sanction of the company in general meeting.

"44. Such new shares shall be of such amount, and shall be issued for such consideration, on such terms, and (subject to the conditions hereinafter contained as to the consent of the holders of any class of shares, where such consent is necessary, and to the rights of the first and second preference shares) with such preference or priority, as regards dividends or in the distribution of assets, or as to voting or otherwise, over other shares of any class, whether then already issued or not, or as shares to be deferred to any other shares with regard to dividends or in the distribution of the assets, as the board may determine."

"113. The board may, before recommending preferential or any other dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund, to meet contingencies, or for equalizing dividends, or for repairing, or maintaining, or extending the buildings or plant of the company, and the same may be applied accordingly, from time to time, in such manner as the board shall determine; the board may, without placing the same in reserve, carry over any profits which they think it not prudent to divide."

"126. If upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, then, subject as to any new shares to the special terms upon which they may be issued, the excess shall be distributed among the members in proportion to the capital paid, or which ought to have been paid, on the shares, other than first and second preference shares, held by them respectively at the commencement of the winding-up, not being amounts paid in advance of calls. . . . . But this clause is to be without prejudice to the rights of the holders of the first and second preference shares and any other shares issued upon special conditions."

After the adoption of the new articles a number of third preference shares were issued in pursuance of a resolution which was as follows: "That of the 285,253 ordinary shares of the company remaining unissued, 250,000 shares be issued from time to time as hereinafter provided as third preference shares, and that the holders thereof be entitled to a non-cumulative dividend at the rate of 5 per cent. per annum on the amount paid up thereon, and that, in the event of the company being wound up, the surplus assets thereof shall be applied, in the first place, in repaying to the holders of the first preference shares and second preference shares already issued by the company the full amount paid up thereon, and that such surplus assets shall next be applied in repaying to the holders of the third preference shares, the subject of this resolution, the full amount paid up thereon."

In pursuance of a special resolution of the company passed and confirmed on February 21 and March 21, 1901, authorizing the board to convert issued fully-paid ordinary shares, and unissued ordinary shares, when issued and fully paid, into preferred and deferred stock, the board passed resolutions by which some of the ordinary shares then issued and fully paid up were converted into preferred stock and the rest into deferred stock, and it was resolved "that the following provisions shall have effect with regard to such stocks :—(*a*) The preferred stock shall, as between the preferred stock and deferred stock, carry a fixed non-cumulative dividend at the rate of 6 per cent. per annum on the capital paid up thereon, and, in the event of the winding up of the company, shall rank for repayment of capital, together with a bonus of 5 per cent., in priority to the deferred stock. (*b*) The deferred stock shall confer a right to the surplus profits, and, in the event of a winding-up, to the surplus assets of the company to which the holders of the ordinary shares would, but for the said conversion, be entitled." The resolution also provided that 200,000 of the unissued ordinary shares should be issued as preferred shares, ranking, for payment of dividend and repayment of capital, pari passu with the preferred stock. These 200,000 shares were issued, and were afterwards fully paid up, and converted into preferred stock.

The rest of the unissued ordinary shares, and further shares in increases of capital, were issued, and afterwards paid up in full, and turned either into preferred stock or deferred stock; and all stock and shares of the company were fully paid up before it went into liquidation.

On January 9 and 25, 1912, the following resolution was passed and confirmed as a special resolution :—"That this company be wound up voluntarily under the provisions of the Companies (Consolidation) Act, 1908, that Mr. George Franklin, the president of the company, be and he is hereby appointed liquidator for the purpose of such winding-up, and that the powers of the directors of the company be continued so far as regards all questions relating to the ascertainment of the purchase price to be paid by the Postmaster-General to the company for the plant, property, and assets of the company purchased by him until such questions are disposed of, and for all such other purposes connected with the company as are legally consistent with the powers of the liquidator."

The liquidator took out an originating summons in the winding-up to obtain the determination of the question which of the share or stock holders were entitled to a surplus of about 200,000*l.* which remained after paying and discharging all the debts and liabilities of the company and repaying to all the share and stock holders the full amount of the capital paid or credited as paid on their respective shares and stock and the 5 per cent. bonus to the preferred stockholders.

The surplus was the remains of a very large reserve fund which had from time to time been set aside, and which had not been capitalized.

The summons was adjourned into Court and heard on July 15 and 16, 1913.

Danckwerts, K.C., and *Percy F. Wheeler*, for the liquidator, stated the facts and the questions involved.

Butcher, K.C., and *Austen-Cartmell*, for the first preference shareholders. The rights of the first preference shareholders are provided for by clause 33 of the original articles of association. That clause, it is true, gives them a cumulative dividend, of a certain percentage and "no more," but those words mean "no more by way of dividend while the company is carrying on business." On a winding-up they are to have a preferential return of their paid-up capital, but are to have no further participation "in profits." There is no word in the clause to exclude the first preference shareholders from sharing in the surplus assets left after repayment of the capital paid on all the shares and stock; and, as the articles are silent on this point, the first preference shareholders are entitled to rank pari passu with the shareholders of the other classes: *Birch* v. *Cropper* (1); *In re Espuela Land and Cattle Co.* (2) [They also referred to *Will* v. *United Lankat Plantations Co.* (3) and Palmer's Company Precedents, 6th ed. pt. i. p. 381.]

P. O. Lawrence, K.C., and *Beebee*, for the second preference shareholders. The fund available for division has never been capitalized and belongs to the persons who were entitled to the

(1) (1889) 14 App. Cas. 525.

(2) [1909] 2 Ch. 187.

(3) [1912] 2 Ch. 571.

profits before the winding-up commenced. The resolution of August 11, 1885, with reference to the second preference shares does not confine their right to share in profits to a dividend of 6 per cent. There is such a restriction in the case of the first preference shareholders, and they have no claim on the fund, but the claim of the second preference shareholders rests on a different ground. The fund represents undrawn profits, which are not altered in their character or ownership, and are not divisible as capital: *In re Bridgewater Navigation Co.* (1)

The fact that the company has gone into liquidation without any declaration of dividend in respect of the fund having been made does not alter the character or ownership of the fund: *Bishop* v. *Smyrna and Cassaba Ry. Co.* (No. 2) (2); *In re Odessa Waterworks Co.* (3) In *In re Crichton's Oil Co.* (4) the money in which the preference shareholders claimed the right to share was never available for dividend. If, as we contend, the second preference shareholders are not confined to 6 per cent. out of profits, they are entitled to share in a fund representing profits although no declaration of dividend has been made: *In re W. J. Hall & Co.* (5)

We are entitled to the benefit of the dictum of Swinfen Eady J. in *In re Espuela Land and Cattle Co.* (6) that "there is not any rule of law that shareholders having a fixed preferential dividend take that only." [They also referred to *In re Accrington Corporation Steam Tramways Co.* (7)]

Jenkins, K.C., and *T. J. C. Tomlin*, for the third preference shareholders. The new articles of association did not alter any rights which had been previously given in express terms to the first and second preference shareholders, but they altered any rights which those shareholders might have taken by implication. The third preference shareholders, as one class, and the preferred and deferred stockholders, as another class, are the only persons entitled to share in the fund, and the first and second preference shareholders are not entitled to any further share in the assets. The new articles were adopted as part of a great scheme of amalgamation, and the alteration of rights, if any, was in accordance with the law: see Buckley on Companies, 9th ed. p. 24.

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(1) [1891] 2 Ch. 317, 327.
(2) [1895] 2 Ch. 596.
(3) (1897) [1901] 2 Ch. 190, n.
(4) [1902] 2 Ch. 86.
(5) [1909] 1 Ch. 521.
(6) [1909] 2 Ch. 187, 193.
(7) [1909] 2 Ch. 40.

In *In re Bridgewater Navigation Co.* (1) the Court had only to regard s. 133 of the Companies Act, 1862 (for which s. 186 of the Companies (Consolidation) Act, 1908, is now substituted), which provides that in a voluntary winding-up the property of the company, after satisfying liabilities, "shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." The surplus assets, so far as they consisted of undrawn profits, were there, in default of provision otherwise, distributed according to the section, and as profits. But here the profits have been capitalized, and express provision is made as to their distribution. The third preference shareholders are to have a dividend of 5 per cent. and a return of their capital, but it is not said that that is all they are to get.

If the distribution of the surplus assets is regulated by clause 126 of the new articles, then we are within the dictum in *In re Espuela Land and Cattle Co.* (2); and that case, though referred to in the Court of Appeal in *Will* v. *United Lankat Plantations Co.* (3), is not overruled by the Court of Appeal's decision.

[SARGANT J. Farwell L.J. apparently desired to leave open the point decided in *In re Espuela Land and Cattle Co.* (2)]

Younger, K.C., and *H. Asquith*, for the deferred stockholders. The deferred stockholders were originally the holders of ordinary shares and must still be taken as such.

The first preference shares are limited strictly to 6 per cent. as regards profits, and on the authorities they are limited as regards return of capital. The second and third preference shareholders are on the authorities limited as regards both profits and return of capital. The preferred stockholders are only entitled to a 5 per cent. dividend, a return of their paid-up capital, and a bonus. All that is left belongs to the deferred stockholders, whether the fund is capital or income.

(1) [1891] 2 Ch. 317.
(2) [1909] 2 Ch. 187.
(3) [1912] 2 Ch. 571.

[They were stopped as to the claim of the first preference shareholders.]

The second preference shareholders' rights are not dependent on the resolution by which they were created, but are governed by the new articles, which were passed by way of bargain between the existing classes of shareholders. Clause 126 of the new articles excludes the second preference shareholders from the right to any further share in the assets than what they have received. The power to alter the rights of preference shareholders where not given by the memorandum of association is undoubted; if the rights are to be unalterable they must be given by the memorandum: *Ashbury* v. *Watson* (1); *Andrews* v. *Gas Meter Co.* (2)

The actual decision of Swinfen Eady J. in *In re Espuela Land and Cattle Co.* (3) that where preference shareholders are given the right, on winding up, to a return of capital, there is no general rule that they have no right to a further share in the surplus assets, is founded on his dogma that "there is not any rule of law that shareholders having a fixed preferential dividend take that only," but that dogma is inconsistent with the decision of the Court of Appeal in *Will* v. *United Lankat Plantations Co.* (4) It is submitted that his actual decision as to capital is also inconsistent with the Court of Appeal's decision. The theory of "subordinate equality" as between different classes of shareholders, put forward by the unsuccessful party in that case, was scouted by Cozens-Hardy M.R., as a similar contention was by the Court of Appeal in *Andrews* v. *Gas Meter Co.* (2) In each case the preference given is a matter of contract.

The same reasons apply to the third preference shareholders, who are also excluded. The rights of the preferred stockholders are defined by the resolutions relating to them, and they have received all that they are entitled to. [They also referred to Palmer's Company Precedents, 11th ed. pt. i. p. 814.]

Hon. F. Russell, K.C., and *Whinney*, for the preferred stockholders. The claims of all the preference shareholders should be disallowed. If they were to get all they claim, we should have to return our bonus.

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(1) (1885) 30 Ch. D. 376.

(2) [1897] 1 Ch. 361, 370.

(3) [1909] 2 Ch. 187. 193.

(4) [1912] 2 Ch. 571.

The contract for the sale of the assets to the Postmaster-General provided for the payment of the purchase-money at a certain date, and that interest should be paid on the money during any delay in payment. Payment was deferred for some time, and interest has been paid accordingly. If there had been no delay, the preferred stockholders would have been earning interest on their money, and they are entitled to interest during the delay as an equivalent to their right to interest on their stock during that period, in addition to their 5 per cent. bonus.

SARGANT J. This is a summons seeking for the distribution, upon proper principles, of a comparatively small surplus which is left, in the winding up of the company, beyond the amount required for the repayment of the whole of the share capital in full after discharging liabilities of the company. The matter is one of some complication, but it has been argued very fully and carefully before me, and I do not think that I should better matters by reserving my judgment.

The material provision of the Companies (Consolidation) Act, 1908, which is in question is s. 186, which directs that on the voluntary winding up of a company "(1.) the property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company." In my opinion that enactment directs by implication that the distribution of the surplus assets of the company, over and above its liabilities, is in the first instance to be regulated by the provisions in the articles, if they contain provisions dealing with it, and, therefore, the first question that I have to determine is whether, on the true construction of the articles and of the resolutions dealing with the creation of these various shares, there are provisions which otherwise provide for the distribution of this surplus. If there are such provisions, it appears to me that the questions which were debated in *In re Bridgewater Navigation Co.* (1) are excluded, because, as I read that case, that was only a decision with reference to the way in which the assets should be divided amongst the members according to their rights and interests in the company, where its articles did not contain any provision for a distribution otherwise than in the mode pointed out by the statute then applicable. It appears to me that, if articles do in fact provide that on the winding-up surplus assets shall be divided in some particular way, that particular method must necessarily have precedence over any general equity or right such as was administered in *In re Bridgewater Navigation Co.* (1)

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(1) [1891] 2 Ch. 317.

In this case there are no less than five sets of shareholders. There are first preference shareholders, second preference shareholders, third preference shareholders, preferred ordinary shareholders, and deferred ordinary shareholders. I think in some cases the shares have been converted into stock, but I need not elaborate that difference for the present purpose; it is only a difference, practically, of name. The surplus of 200,000*l.* or so, which is left to be dealt with, is a surplus which may be looked upon as the remains of a very large reserve fund which was from time to time set aside, and which certainly had not been appropriated necessarily as capital, so that the facts would bring the case within *In re Bridgewater Navigation Co.* (1) if there was not the difference here that the articles do make some provision on the subject of the distribution of surplus assets. I think nothing had been done by the company which definitely turned this reserve fund, or a sufficient part of it, such as the 200,000*l.*, into capital, and rendered it impossible to distribute that fund as dividend if the company had gone on as a going concern.

The rights of the first preference shareholders depend upon article 33 of the original articles of association of the company, and that article reads thus: "Of the original capital, 90,000 shares, numbered 1 to 90,000 inclusive, shall be issued as ordinary shares; and 15,000 shares, numbered 90,001 to 105,000 inclusive, shall be issued as preference shares, entitling the holder to receive a preferential cumulative dividend of 6 per cent. per annum, and no more, on the amount for the time being paid up or credited as paid up thereon, out of the profits of the company"

(1) [1891] 2 Ch. 317.

—that, I think, is the part that deals with the distribution of dividend while the company is a going concern—"and to the preferential repayment of the amount paid up, or credited as paid up, on such shares out of the assets of the company in the event of the company being wound up, or any final distribution of the assets, in priority to any payment in respect of the ordinary shares of the company, but to no other participation in profits." That second part seems to me to be dealing exclusively with what happens on a winding-up; and although an argument was addressed to me to the effect that those last words, "no other participation in profits," dealt only with profits strictly speaking, in my opinion, on the obviously true construction of the clause, that was meant to prevent the first preference shareholders either getting more than their preferential 6 per cent. during the life of the company or getting anything more than the repayment of their capital on the winding up of the company. I do not feel as to that any doubt whatever.

Then comes a rather more difficult question, namely, the question as to the position of the second preference shareholders. Their shares were created by a resolution of the company passed on August 11, 1885, which was in these terms: "That the capital of the company be increased by the issue of 15,000 new shares of 10*l.* each. That such shares be called second preference shares, and that the holders thereof (subject to the payment of the preferential dividend of the original preference shares) be entitled to a cumulative preferential dividend at the rate of 6 per cent. per annum. After the ordinary shares have received a dividend at the rate of 6 per cent. per annum out of the profits of each year, the second preference shares and the ordinary shares shall participate rateably, according to the amounts paid up thereon, in any surplus profits." That determines the rights of the holders of the second preference shares while the company is a going concern. Then the resolution goes on: "The second preference shares shall not confer any right of voting at any general meeting of the company, and, in the event of the company being wound up, the surplus assets thereof shall be applied in the first place in repaying to the holders of the original preference shares the full amount paid up thereon, and, subject thereto, in repaying to the holders of the second preference shares the full amount paid up thereon, in priority to any payment in respect of the ordinary shares of the company."

The question upon that clause, as in the previous case, is whether there is an implied negativing of any right on the part of the holders of the second preference shares to receive more in the winding up of the company than the repayment of the whole of their capital. In my opinion there is. I am speaking now, on first impression, on my own construction of these articles, apart from authority, which I shall allude to hereafter. In my judgment the fact that an express right was given, in respect of dividend, to receive more than the amount of the preferential dividends in certain events strengthens the inference that the silence as regards return of capital in a winding-up indicates that there was to be no return of capital beyond the return of the nominal amount of the capital of the shares. I should have felt disposed to come to that conclusion even without the assistance to be derived from a consideration of the terms of the rights to dividend, but with that assistance it seems to me that any business man reading that resolution would come to the conclusion that the holders of the second preference shares were not entitled on a winding-up to get more than their return of capital.

Some time after that issue of shares, the company was amalgamated, in the popular sense, with one or two other companies, and fresh articles of association were adopted. I do not, for the purpose of dealing with the question of the first and second preference shares, think it necessary to consider whether there was any alteration of any of the rights attached to those shares so far as those rights had not been expressly given as preferential rights. That may be a very difficult question. On the view I have taken of the rights of those two sets of preference shareholders prior to the adoption of the new articles, it does not occur, but the articles are important for the purpose of dealing with the rights of the third preference shareholders who had their shares created after the adoption of those articles. The material articles are articles 4, 5, 44, and 126. I will not go through those articles in detail,—at any rate, the first three of them,—because I may state generally that they amount to this, that the holders of those new shares, which I understand on the reading of the articles (and no contention was put before me to the contrary) include not merely shares beyond the authorized capital of 6,000,000*l.* mentioned in the memorandum of association, but shares within that limit which had not been issued at the date of the adoption of the articles of association, were to hold these shares generally upon the same terms as the original shares, except so far as special terms might be imposed at the date of the issue of any particular shares. Then article 126, which is most important, provides this: "If upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, then, subject as to any new shares to the special terms upon which they may be issued, the excess shall be distributed among the members in proportion to the capital paid, or which ought to have been paid, on the shares, other than first and second preference shares held by them respectively at the commencement of the winding-up, not being amounts paid in advance of calls." And then, after providing for an event which did not happen, the surplus assets being sufficient, the article winds up with these words: "But this clause is to be without prejudice to the rights of the holders of the first and second preference shares, and any other shares issued upon special conditions."

Subsequent to the adoption of those articles a great number of third preference shares, amounting, I think, in the whole to 1,250,000*l.*, were issued, and they were issued upon the following terms: "With regard to the creation of one million two hundred and fifty thousand pounds five per cent. preference shares, it was resolved: 1. That of the 285,253 ordinary shares of the company remaining unissued, 250,000 shares be issued from time to time as hereinafter provided as third preference shares, and that the holders thereof be entitled to a non-cumulative dividend at the rate of 5 per cent. per annum on the amount paid up thereon, and that in the event of the company being wound up the surplus assets thereof"—"surplus assets" clearly meaning surplus assets after discharging liabilities—"shall be applied, in the first place, in repaying to the holders of the first preference shares and second preference shares already issued by the company the full amount paid up thereon, and that such surplus assets shall next be applied in repaying to the holders of the third preference shares, the subject of this resolution, the full amount paid up thereon." Here, again, the question is whether that direction, that on a winding-up the full amount paid up on the third preference shares shall be paid preferentially to the holders of those shares, impliedly negatives any right of the holders of those shares to participate, to any further extent, on a winding-up. In my opinion, that does negative such a right. I think that possibly some meaning must be attached to the word "full," as bearing on that question, and that something is to be taken into account with regard to the rights of the first and the second preference shareholders. If I am right in thinking that they were not to get in any case more than the full amount of their capital, it would be a curious thing if the holders of the third preference shares were to get more than the full amount of their capital. But apart from those indications, and apart from the authorities to which I am going to refer, I should have thought that, as a matter of ordinary construction, not only from the business point of view but from the legal point of view, the express mention of the rights which the preference shareholders were to be entitled to in a winding-up would have operated as an exclusion of any further or other rights. It would be on the general principle which is applied in many such cases, as for instance where there is a question of express covenants for title in a demise of property. There, if there is no express covenant, rather onerous covenants are implied by virtue of the use of the word "demise." If, on the other hand, express covenants are inserted, those express covenants exclude any implied covenants beyond that. Similarly here I should have thought, in a matter which is specially dealt with by the terms of the issue of the shares, that those terms of issue would have fully defined the terms of issue, and would not have been a mere modification of certain anterior or antecedent rights which might be supposed to appertain to the shares as shares.

That being so, is there authority which compels me to come to a construction different from that which I have mentioned? There is, undoubtedly, the case of *In re Espuela Land and Cattle Co.* (1), before Swinfen Eady J. In that case the articles of association provided that in the case of the winding up of the company "the said preference shares shall be entitled to be paid out of the property and assets of the company the full amount of capital paid up thereon in preference and priority to and before any payment shall be made thereout in respect of the ordinary shares"; and the learned judge decided, amongst a great number of other points, that the insertion of that express right did not deprive the holders of the preference shares of the ordinary right, which they would have had but for those words, to share in what may be called "excess assets"—that is, assets beyond the amount required fully to replace the capital—but I do not think that the learned judge intended to lay down any absolute canon of construction. He says it is merely a construction of the memorandum and articles, by which I think he means the particular memorandum and articles, and he does—and I think that is important—deal with the analogy, which had been presented to him in argument, of preferential dividend, and, as far as I read his judgment, he deals with preferential dividend and preferential return of capital in the winding-up on the same principles, and all that he says is that in the absence of any provision to the contrary the rights of the shareholders are clear. I take that remark as applying to the rights of the shareholders in respect of the dividend as well as in respect of capital; certainly it is founded on a ground common to both sets of rights.

That being so, Joyce J. decided (following out logically that canon of construction, on the assumption that it was a right one) in *Will* v. *United Lankat Plantations Co.* (2) that the holder of a share entitled to preferential dividend was entitled, in default of express provision to the contrary, to share with the holders of the ordinary shares in excess dividend beyond the amount of the preferential dividend. That was taken to the Court of Appeal, where the judgment of Joyce J. was reversed, and the most important part of the reasoning of the Master of the Rolls is to be found at pp. 577 and 578 of the report. He

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(1) [1909] 2 Ch. 187, 188.

(2) [1912] 2 Ch. 571.

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says: "But then it is said that the matter ought to be approached in a different way. You ought to see what, according to the true construction of the articles, is prima facie the right of all the shareholders in the company; and if you find that all the members of the company are entitled rateably to share in the profits of the company, you ought not to cut down the rights of the preference shareholders except so far as you find something equivalent to a negative of their right to any further share in the profits. I do not assent to that view. I think the true construction of the resolution is that which I have indicated, and that there is nothing in article 115 or in article 43 which justifies us in coming to any other conclusion. In other words, I think that although on any matter as to which the resolution is silent the articles do prevail, such, for instance, as the right of voting or the right to surplus on a winding-up, in such cases, no doubt, the articles will prevail; but when you find a resolution which, according to its true construction, contemplates, and only contemplates, a fixed dividend, it is really exclusive of article 43 and article 115, in the sense in which those articles are relied upon by the present respondent." And Farwell L.J. in his judgment says this (1): "But the fallacy of the ingenious argument of Mr. Younger and Mr. Tomlin is this. They treat shares as though they were born into the world, all equal; and as if preference was a kind of subsequent attachment to them; but the whole of the attributes of a preference share are limited and defined on its birth." Then the learned Lord Justice does recognize that the circumstances with regard to dividend and capital are different in many respects, and he says that in that case he expresses no opinion as to what may happen in a winding-up. But although that may be so, I think he has applied to the rights of preference shares with regard to dividend a canon of construction which is necessarily applicable in the same way to the rights of preference shares in the winding-up, if those rights are expressly provided for.

Looking at the way in which Swinfen Eady J. dealt with the question of the rights of winding-up, as being analogous to the similar rights to dividend while the company is a going concern, and looking to the canon of construction which was applied by the Court of Appeal in *Will* v. *United Lankat Plantations Co.* (1), it appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding-up, the express gift or attachment of preferential rights to preference shares, on their creation, is, prima facie, a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled.

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(1) [1912] 2 Ch. 579.

In my opinion, therefore, this surplus is not divisible except among the deferred stockholders. The articles otherwise provide, namely that the holders of the first, second, and third preference shares are not to share in any excess assets. I think that that really renders it unnecessary for me to consider the extra question which it was proposed to introduce into the summons by way of amendment. The only thing left to me to deal with is the argument which was put forward by Mr. Russell, that the holders of the preferred stock were entitled to some interest on that stock beyond their bonus of 5 per cent., because the completion of the purchase by the Postmaster-General had been deferred for some six months, and interest had been paid on the purchase-money in the interval, which, as I understand it, would provide the holders of the preferred stock with an equivalent to their right of interest on their stock during that period. I cannot accept that argument. It has been held repeatedly that, in a winding-up, such interest is not payable to holders of preference shares, unless there has been some express contract for such payment.

I cannot think that on any such sum of money due to the preferred stockholders and forming part of the price payable by the Postmaster-General they are entitled to interest. In this case, in fact, I should think the winding up of the company and the getting of the sum available for distribution was far speedier than in nine cases out of ten—at any rate in nine cases out of ten of considerable magnitude—and I see no reason here for departing from the ordinary rule by giving to the preferred stockholders anything more than the nominal amount of their shares together with the agreed bonus of 5 per cent. which I understand they have already received.

(1) [1912] 2 Ch. 571.

The result is that the whole of this surplus is divisible among the deferred stockholders.

Solicitor for the liquidator: *William E. Hart.*

Solicitors for the first preference shareholders: *Mann & Crimp.*

Solicitors for the second preference shareholders: *Hatchett-Jones, Bisgood & Marshall.*

Solicitors for the third preference shareholders: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Boote, Edgar, Grace & Rylands, Manchester.*

Solicitors for the preferred stockholders: *Sandford & Co.*

Solicitors for the deferred stockholders: *Ashurst, Morris, Crisp & Co.*

F. E.

In re PROPERTY INSURANCE COMPANY, LIMITED.

ASTBURY J.
1914
March 10.

[00386 of 1913.]

Company—Winding-up—Examination under s. 174*—Power to order Examination in open Court—Jurisdiction—Discretion—Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 174*—Companies* (*Winding-up*) *Rules*, 1909, *r.* 5, *sub-r.* 2.

Although (*semble*) the Court may have jurisdiction under r. 5, sub-r. 2, of the Companies (Winding-up) Rules, 1909, to order an examination under s. 174 of the Companies (Consolidation) Act, 1908, to be held in open Court, the jurisdiction should only be exercised in very exceptional circumstances. For instance, a person not charged with fraud should not be ordered to be examined in open Court.

In re Great Kruger Gold Mining Co. [1892] 3 Ch. 307; *Haddock's Case* [1902] 2 Ch. 73; *Ex parte Barnes* [1896] A. C. 146; and *In re John Tweddle & Co.* [1910] 2 K. B. 697 applied.

In re New Zealand Loan and Mercantile Agency Co. (1894) 10 Times L. R. 371, 379, distinguished.

MOTIONS.

These were motions by two directors and a former director of the above company to discharge an order made by the registrar for their examination in open Court under ss. 174 and 193 of the Companies (Consolidation) Act, 1908.

The company was incorporated on April 27, 1898. The applicants became directors on August 25, 1909. The third applicant resigned on January 8, 1913.

On November 17, 1913, a resolution for voluntary winding up was passed and a liquidator was appointed, and on December 16, 1913, a supervision order was made.

On February 2, 1914, the liquidator made a report drawing attention to serious irregularities in the conduct of the company's business, but not containing any charge of fraud against the applicants. He stated that it was impossible to investigate these matters without examining the applicants and other persons, and he suggested that the examination should be in open Court.

On February 3, 1914, the liquidator issued an ex parte summons for liberty to examine the applicants and other persons under s. 174 in open Court, and on February 14, 1914, the registrar made an ex parte order directing the applicants and other persons to attend before a registrar to be examined in open Court on the part of the liquidator under ss. 174 and 193.

The applicants moved to discharge this order on the ground that there was no jurisdiction under ss. 174 and 193 to order an examination in open Court, and alternatively on the ground that the order was made without any proper or sufficient cause, and without notice to the applicants. The applicants were quite ready to submit to a private examination in the usual way.

H. E. Wright, for the first two applicants. The registrar has acted under r. 5, sub-r. 2, of the Companies (Winding-up) Rules, 1909, which provides that examinations under s. 174 "shall be held in Court or in chambers as the Court shall direct." Now s. 174 is merely a reproduction of s. 115 of the Companies Act, 1862 (25 & 26 Vict. c. 89). Examinations under the latter section were always treated as private, and the depositions as private documents: *In re Great Kruger Gold Mining Co.* (1); *Haddock's Case* (2); Buckley on Companies, 9th ed. p. 406. The section was not confined to directors and officers, but any one might be privately examined. This practice is continued by r. 73, sub-r. 2, and if r. 5, sub-r. 2, really authorizes an examination in open Court, it is repugnant and ultra vires.

(1) [1892] 3 Ch. 307, 325. (2) [1902] 2 Ch. 73, 76.

ASTBURY J.
1914
PROPERTY INSURANCE COMPANY, LIMITED, *In re.*

An examination in open Court is equivalent to a public examination and can only be ordered under s. 175, which reproduces s. 8, sub-ss. 3 to 7, of the Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63). Before such an order can be made there must be a "further report" of the official receiver under s. 148 finding fraud against the person proposed to be publicly examined: *Ex parte Barnes* (1); *In re John Tweddle & Co.* (2) In the present case there is merely the report of the liquidator in the voluntary winding-up. No fraud is charged against the applicants, and the registrar's order, if not wholly ultra vires, is absolutely unjustified.

Percy Wheeler, for the third applicant, adopted the above argument.

Micklem, K.C., and *Henry Johnston*, for the liquidator. Rule 5, sub-r. 2, of 1909, which has statutory force under s. 237, is no novelty. It is merely a reproduction in similar language of r. 5, sub-r. 2, of the Companies (Winding-up) Rules, 1903, and is a modification of the still earlier r. 3, sub-r. 2, of the Companies Winding-up Rules, 1892, which provided that examinations under s. 115 of the Companies Act, 1862, should be held before the registrar in chambers unless the judge otherwise directed. It has evidently always been contemplated that in special circumstances these examinations though usually private might be held in open Court: *In re New Zealand Loan and Mercantile Agency Co.* (3); Palmer's Company Precedents, 11th ed. pt. ii. p. 669.

[ASTBURY J. Does not your argument render s. 175 unnecessary?]

No. That is a quasi-penal section rendering officials who have been charged with fraud in the further report of the official receiver in a compulsory winding-up liable to be publicly examined and at their own expense unless exculpated. Creditors and contributories may take part in the examination, while under s. 174 the examination is usually conducted by the liquidator, and the witnesses have their reasonable expenses tendered in advance. Sect. 175 is clearly confined to compulsory liquidation, while s. 174 may by virtue of s. 193 be utilized in a voluntary liquidation.

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(1) [1896] A. C. 146.

(2) [1910] 2 K. B. 697, 702.

(3) 10 Times L. R. 371, 379.

The registrar could not therefore have ordered a public examination under s. 175, but in the circumstances he considered that the examination under s. 174 should be in open Court. He had clear jurisdiction to make the order under r. 5, sub-r. 2.

[ASTBURY J. Assuming that he had jurisdiction, the question is whether an order for examination in open Court ought to be made unless the liquidator's report contains such charges of fraud, that the report, if made by an official receiver, would have justified a public examination under s. 175. In the present case the applicants are not charged with fraud, and no order for their public examination would have been made.]

There is nothing in the Act or Rules to limit the registrar's discretion in this way. He has had the whole matter before him, and exercised his discretion by ordering an examination in open Court. Unless the Court thinks he has proceeded on an entirely wrong footing, it ought not to interfere.

ASTBURY J. These are motions by three gentlemen who are or have been directors of this company, which is now in voluntary liquidation under the supervision of the Court, asking that the order of February 14, 1914, which was made by the registrar on the ex parte application of the liquidator and directed them to attend for examination in open Court may be discharged on various grounds.

The case raises extremely important questions of jurisdiction and practice under the Companies (Consolidation) Act, 1908, and the Companies (Winding-up) Rules, 1909.

Sect. 174, which reproduces s. 115 of the Companies Act, 1862, provides (sub-s. 1) that "the Court may, after it has made a winding-up order, summon before it any officer of the company . . . . or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs, or property of the company" and (sub-s. 2) "the Court may examine him on oath concerning the same . . . . and may reduce his answers to writing and require him to sign them."

Now for very many years applications were made for examinations under s. 115, and it was always the practice to regard the examinations as private and the depositions as private documents.

Sect. 175, which reproduces s. 8, sub-ss. 3 to 7, of the Companies (Winding up) Act, 1890, provides that when a winding-up order has been made and the official receiver has made a further report under s. 148 "stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation," the Court may, after consideration of the report, direct that "any person who has taken any part in the promotion or formation of the company, or has been a director, or officer of the company," shall attend and be publicly examined.

Sect. 193 provides that where a company is being wound up voluntarily the liquidator may apply to the Court to exercise "all or any of the powers which the Court might exercise if the company were being wound up by the Court."

In the present case the voluntary liquidator has made a very serious report in connection with the affairs of the company and has obtained an ex parte order under ss. 174 and 193 for the examination of the applicants and others in open Court. The question is whether this order ought to have been made.

Rule 5 of the Companies (Winding-up) Rules, 1909, after providing (sub-r. 1) that certain matters and applications shall be heard before the judge in open Court, provides (sub-r. 2) that "Examinations of persons summoned before the High Court under section 174 of the Act, shall be held in Court or in chambers as the Court shall direct."

The Companies (Winding-up) Rules, 1903, r. 5, sub-r. 2, provided in similar language that "Examinations of persons summoned before the High Court under section 115 of the Companies Act, 1862, shall be held in Court or in chambers as the Court shall direct," while the Companies Winding-up Rules, 1892, r. 3, sub-r. 2, provided that "Examinations of persons summoned before the High Court under section 115 of the Companies Act, 1862, shall, unless the judge of the High Court shall otherwise direct, be held before the registrar in chambers."

In treating of public examinations, r. 61 of 1909 provides that the consideration of the official receiver's report "shall be before the judge of the Court personally in chambers" and, in practice, orders for public examination under s. 175 are always made by the judge personally.

Under the heading of "Witnesses and Depositions" r. 73, sub-r. 2, provides that the notes of the depositions of a person examined under s. 174 "shall not be filed, or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the Court shall so direct."

Now the character of examinations under s. 115 of the Companies Act, 1862, has been explained over and over again as being essentially of a private nature.

In *In re Great Kruger Gold Mining Co.* (1) Lindley L.J., referring to the power of ordering a public examination under the Companies (Winding up) Act, 1890, says: "Now, it is obvious that the power here given to the Court goes much further than the power which was conferred by s. 115 of the Companies Act, 1862. It not only in terms applies to persons who have been connected in any way with the promotion or formation of the company, as to which there may be a doubt under s. 115, but it alters the whole character of the examination. The examination under s. 115 was an examination in private. This is an examination in public, and it is an examination in which any creditor or contributory may take part. It is, therefore, a very serious matter. It is all very well to say that it does not hurt a man to be examined; but we know perfectly well to what length these examinations go, and it is a very serious matter indeed to be examined under this section."

Similar observations were made by Byrne J. in *Haddock's Case* (2), and in *In re John Tweddle & Co.* (3) Cozens-Hardy M.R. said: "Now it has been decided by the House of Lords in *Ex parte Barnes* (4) that there is no power to direct a person to attend to be examined unless the official receiver has pledged himself to this extent, that he must say 'In my opinion I think that A. B. and C. D., who are directors and officers of the company, have been guilty of fraud in the promotion of the company'; then the Court may make an order requiring the directors to attend," i.e. for public examination.

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(1) [1892] 3 Ch. 307, 325.
(2) [1902] 2 Ch. 73, 76.
(3) [1910] 2 K. B. 697, 702.
(4) [1896] A. C. 146.

In *In re New Zealand Loan and Mercantile Agency Co.* (1) Vaughan Williams J. made an order for the public examination of certain former directors under s. 8 of the Companies (Winding up) Act, 1890, and subsequently refused a motion to discharge it. The directors appealed from this refusal on the ground that the judge had no proper materials before him to justify the order, which, as founded on a presumption of fraud, cast a slur on them. They were anxious to be examined under s. 115 of the Companies Act, 1862, and in public, their only object being to get rid of the stigma of fraud cast upon them by the order under s. 8. In the result a consent order was made discharging the order under s. 8, and directing a public examination with liberty for the official receiver and any creditor or contributory to take part, putting such questions only as should be allowed by the Court. This case is of no assistance on the present point.

It is contended that there is no power in any circumstances to order an examination in open Court under s. 174. I do not think that is the meaning of r. 5, sub-r. 2, of 1909, which has statutory force under s. 237. It is not, however, necessary to decide that point, because I am quite satisfied that an examination in open Court under s. 174 should only be ordered in very exceptional circumstances. In the present case there is no report by a public official. There is a valuable report by the voluntary liquidator on which the registrar has acted. The liquidator states that there are numerous matters requiring investigation and that it is impossible to investigate them without examining the applicants and others. That may be so, but though the report is of a serious nature there is no charge of fraud against the applicants. The registrar ought not to have ordered them to be examined in open Court, and to that extent his order will be discharged.

Solicitors: *Ashurst, Morris, Crisp & Co.; Roney & Co.; Redfern, Hunt & Co.*

G. R. A.

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(1) 10 Times L. R. 371, 379.

NEVILLE J.

1913

Nov. 26, 27.

LEWIS & ALLENBY (1909), LIMITED *v.* PEGGE.

[1913 L. 755.]

Landlord and Tenant—Covenant—Not to underlet without Consent—Consent not to be withheld in the Case of a Respectable and Responsible Person—Withholding Consent—Time—Underlease without Consent.

A limited company demised a residential flat for a term of years, and the lessee covenanted not to assign or underlet the premises without the consent of the company, such consent not to be withheld in the case of a respectable and responsible person. On April 3, 1913, the lessee applied to the secretary of the company for leave to sub-let to H., a respectable and responsible person, and asked to know by April 14, as H. wanted possession on that day. The secretary forgot to communicate with his directors. On April 14 the lessee, not having received a reply, sub-let to H. and gave him possession. In an action by the company to recover possession for breach of the covenant:—

Held, that there had been no breach of the covenant, for that the consent of the company was a pure formality and had been withheld.

Held, also, that the period from April 3 to 14 was under the circumstances a reasonable time to wait for a reply.

WITNESS ACTION.

By deed dated March 3, 1911, the plaintiff company (therein called the landlords) demised to the defendant Pegge a residential flat, being the top floor of a messuage in Conduit Street, Hanover Square, from September 29, 1911, for twenty-one years at the yearly rent of 100*l.* per annum, payable quarterly; and the defendant Pegge covenanted with the plaintiff company (amongst other things) not to assign, underlet, or part with the possession of the flat "without the consent of the landlords for that purpose being first had and obtained but such consent shall not be withheld in the case of a respectable and responsible person." The lease contained the usual proviso for re-entry on breach of any of the lessee's covenants.

By a written agreement dated April 14, 1913, and made between the defendant Pegge of the one part and one Higham of the other part, the defendant Pegge sub-let the flat to Higham for six months from April 14, 1913, at a weekly rent, and the same afternoon gave Higham possession of the flat.

On April 18, 1913, the plaintiff company commenced this action against Pegge and Higham to recover possession of the flat, and by their statement of claim alleged that the defendant Pegge had committed a breach of his aforesaid covenant by sub-letting the flat to the defendant Higham without their consent, and they also alleged that their consent was never applied for.

The defendant Pegge by his defence did not admit the breach of covenant and denied that he had sub-let to the defendant Higham without the consent of the plaintiff company, and alleged that on April 3, 1913, he verbally informed the secretary of the plaintiff company of the proposed letting to the defendant Higham, and that the defendant Higham wanted possession of the premises on April 14, and accordingly that he (Pegge) requested the secretary to let him know by that date in case there was any objection on the part of the directors to the proposed letting. He further pleaded that, not having heard from the secretary by April 14, he assumed that the directors consented to the letting, and on such assumption sub-let to the defendant Higham, who was a respectable and responsible person.

Subsequently the defendant Higham, on the expiration of his tenancy, was dismissed from the action, and his costs were paid by the defendant Pegge under an agreement with the plaintiff company that they would repay him these costs if he was successful at the trial of the action.

The action now came on for trial. It was admitted that Higham was a respectable and responsible person, and it was common ground that an interview took place between the defendant Pegge and the secretary of the plaintiff company on April 3, when some matters in dispute not relating to the flat were discussed. But the secretary denied that at this interview the defendant Pegge made any mention of Higham or applied for leave to sub-let the flat, and deposed that he first heard of the sub-letting on April 15 and at once reported it to one of the directors, and thereupon a meeting of the directors was held on April 17, when they resolved that steps should be taken to recover possession of the flat on the ground that the defendant had sub-let without their consent. There was no meeting of the directors between April 3 and 17.

Jenkins, K.C., and *J. E. C. Adams*, for the plaintiff company. The defendant did not apply for the plaintiffs' consent to sub-let, and has therefore broken his covenant not to assign or underlet without consent and can gain no advantage from the provision that the lessor's consent shall not be withheld in the case of a respectable and responsible person : *Barrow* v. *Isaacs & Son* (1); *Eastern Telegraph Co.* v. *Dent.* (2) If the defendant had applied for consent and the plaintiffs had refused it, he could have sub-let on the ground that the plaintiffs could not refuse consent, but this does not apply where the consent is not applied for and therefore cannot be said to be withheld.

Peterson, K.C., and *Dighton Pollock*, for the defendant. Under this covenant it was necessary for the lessee to apply for the lessors' consent, but not to obtain it, and if it is refused or not given, then it is withheld within the meaning of the covenant, and the lessee can at once sub-let without licence : *Treloar* v. *Bigge* (3); *Hyde* v. *Warden* (4); *Sear* v. *House Property and Investment Society.* (5) Both *Barrow* v. *Isaacs & Son* (1) and *Eastern Telegraph Co.* v. *Dent* (2) only apply where consent is not asked for. Here it was applied for, and the company could not withhold their consent. There was no breach of the covenant. If the defendant had brought an action for a declaration that he was entitled to sub-let he would have been entitled to an order with costs: *Jenkins* v. *Price* (6); *Evans* v. *Levy* (7); *West* v. *Gwynne* (8); *Young* v. *Ashley Gardens Properties* (9); *Andrews* v. *Bridgman* (10); *White* v. *Hay.* (11) The secretary of the company was the proper person to communicate with on behalf of the company, and in fact they either consented or withheld consent. In either case the defendant could underlet.

Jenkins, K.C., in reply.

[NEVILLE J. I think that on April 3 the leave of the company to sub-let to Higham was asked for. Then nothing happened until the 15th. Why should not this be a withholding of consent?]

(1) [1891] 1 Q. B. 417.
(2) [1899] 1 Q. B. 835.
(3) (1874) L. R. 9 Ex. 151.
(4) (1877) 3 Ex. D. 72.
(5) (1880) 16 Ch. D. 387.
(6) [1907] 2 Ch. 229, 235.
(7) [1910] 1 Ch. 452.
(8) [1911] 2 Ch. 1.
(9) [1903] 2 Ch. 112.
(10) [1908] 1 K. B. 596.
(11) (1895) 72 L. T. 281.

There must be a withholding of consent, but here the matter was not brought before the board until April 17. The defendant has not got further than *Treloar* v. *Bigge*. (1) The true view is that the provision as to withholding consent is a part of the covenant by the lessee and not a cross-covenant by the lessor. Admitting that the secretary is the proper person to apply to, is applying to the secretary sufficient in itself to amount to withholding of consent by the company? The defendant in his statement of defence does not plead that the consent of the company was refused, and consent was not in fact withheld. It was for the defendant to see that the matter was transmitted to the board, and not to assume that it was.

NEVILLE J. In this case the plaintiff company seek to eject the defendant from the flat which he holds under a lease from them. They allege that there has been a breach of a covenant in the lease which entitles them to do so. The covenant is in a usual form. It is that the lessee will not assign, underlet, transfer or part with the possession of the flat without the consent of the landlords, such consent not to be withheld in the case of a respectable and responsible person. From *Treloar* v. *Bigge* (1) onwards the authorities shew that the proper construction to be put upon such a covenant is that it is a qualified covenant, and should the consent of the landlord be withheld from an assignment to a respectable and responsible person an assignment to such a person is not a breach of the covenant. It is obviously a formality to apply for the consent of the landlord in a case where under the terms of the covenant he has no power to prevent the assignment by withholding his consent. It matters not, where the proposed assignee is a respectable and responsible person, whether the landlord gives or does not give his assent. The cases shew that, if on the one hand the landlord has been asked and refused or has been asked and withheld his consent, the lessee retains his interest under the lease, whereas if he has not been asked and so is unable to give the consent that he should give, the withholding of which is inoperative if the request be made, then the whole of the

(1) L. R. 9 Ex. 151.

property of the lessee becomes the property of the lessor. It certainly seems strange that so small and perfectly indifferent a matter should make such a difference, but so stands the law. It has also been held that where the omission to obtain the consent, which the landlord cannot withhold without exonerating the lessee from the covenant, is from want of knowledge on the part of the lessee, the tenant who by that unfortunate mistake has lost his property is not entitled to relief.

So what I have to consider is how the law applies to the case before me. I understand the facts to be these. On April 3 the lessee went to the secretary of the plaintiff company, who was in charge of the company's office, and said that he wished to sub-let to Mr. Higham (there may be uncertainty about the actual words used, but I think that undoubtedly April 14 was mentioned) and wanted to know if there was any objection to his assignment before that date, because that was the date on which he had agreed to give possession to Higham. The secretary of the company says that nothing whatever took place about underletting to Mr. Higham, and that he only became aware of the underletting by reason of the wife of the new tenant entering the flat. I think the secretary must have forgotten it. So we have it that the application was made to the secretary, who I think was the proper officer of the company, for leave to sub-let to Higham, and it was intimated that the leave was required by the 14th. As a matter of fact there is no evidence to shew that the secretary ever communicated that application to any one of the board of directors, consequently I have no evidence that that matter was ever brought before the board at all, or that they were asked to consent, or that they refused to consent. No further communication was made to the defendant, and on April 14 he sub-let to a gentleman who is admitted by the plaintiff company to be and to have been at the time a respectable and responsible person from an assignment to whom they could not have withheld their consent.

Under these circumstances which of the two doctrines apply? Has the defendant lost his property, although he asked for consent, because he neither got it nor any intimation that it was refused, nor indeed upon the facts can I say that it ever was considered by the company and refused, or is it a case in which the lessee has done all that is necessary on his part and is exonerated from the obligation of the covenant and is entitled without breach to assign? It appears to me, dealing with the words which I find in this covenant, that, as such consent is not to be withheld in the case of a respectable and responsible person, if the lessee applies for such consent and within a reasonable time that consent is not granted, then within the meaning of the covenant it is withheld, and the lessee will not lose his property if he assigns to the person whose name he has given to the landlord. Under the present circumstances I think the period between April 3 and 14 was a reasonable time, and, inasmuch as no intimation was made to him either way in the interval, there was a withholding within the meaning of the covenant, and therefore that the sub-lease to Mr. Higham was good.

Just one word with regard to "reasonable time." I do not mean to say that eleven days in all cases would be a reasonable time. There may be cases in which a much longer time ought to be given to a lessor. I think the time must vary in every case that may come before a judge or jury, but I would point out that in many cases, if too long a time is allowed, the object of the request would probably be defeated, because these are matters in which, if a man cannot get the premises quickly, he may go somewhere else. I hold that there has been no breach of the covenant, the sub-lease to Mr. Higham was good, and the action must be dismissed with costs.

Solicitors: *Walter Martin & Co.; H. E. & W. Bury.*

H. L. F.

SARGANT J.

1913

Dec. 5, 9, 10, 19.

DANIELS v. TREFUSIS.

[1911 D. 1771.]

Contract—Memorandum in Writing—Signature by Agent "lawfully authorized"—Solicitor—Sale of Land—Part Performance—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

The Statute of Frauds may be satisfied as completely by a note or memorandum, signed by an agent, of the terms contained in a verbal contract, as by a note or memorandum signed by the principal himself, provided the agent had authority to sign the particular note or memorandum; and the fact that the agent was not authorized or intended to bind his principal by a contract is immaterial.

T. verbally agreed with G. for the purchase of land for 700*l*., and paid a deposit to and obtained a receipt therefor from G., but did not sign any document himself. G. at the time was acting for D., who was the owner of the property and the undisclosed principal, but afterwards alleged that he had agreed to buy the land from D. for 600*l*. and that he was contracting with T. on his own account and sub-selling to him at an increased price. G. having commenced an action against D. (*G.* v. *D.*) for specific performance of the alleged agreement between them, X. & Co., the solicitors for D., being desirous of obtaining a proof of T.'s evidence in that action, wrote to Y. & Co., the solicitors for T., asking for a short statement from their client (T.) as to what had occurred between G. and T. Y. & Co. returned a statement by T. as to the verbal agreement with G., but this was considered insufficient. X. & Co. then wrote to Y. & Co. asking for replies to certain questions to be answered by T., and Y. & Co. replied, in a letter signed by them, saying that they enclosed the questions with the answers of T. (which were made but not signed by him). The statement first sent, the answers to the questions, and the two letters from Y. & Co. contained materials sufficient to constitute a note or memorandum of the contract within s. 4 of the Statute of Frauds. The action of *G.* v. *D.* having been dismissed, D. brought an action against T. for specific performance of T.'s contract to buy the land:—

Held, (1.) that Y. & Co. were acting in the matter as agents for T.; (2.) that Y. & Co. had authority to sign the particular note or memorandum on behalf of T.; and (3.) that, although Y. & Co. were not authorized and did not intend to bind T. by any contract, there was a sufficient note or memorandum to satisfy s. 4 of the Statute of Frauds.

Smith v. *Webster* (1876) 3 Ch. D. 49 distinguished.

During the negotiations and after the completion of arrangements for the conveyance of the land to T., his solicitors, Y. & Co., asked X. & Co., the solicitors of D., to get rid of two weekly tenants who were in possession. X. & Co. accordingly gave notice to the tenants, who gave up possession :—

Held, that this was an act of part performance as unequivocally referring to the contract as if T. had himself taken possession, and was sufficient in itself to take the case out of the statute.

On February 11, 1911, the Honourable Schomberg Charles Trefusis verbally agreed with Herbert Girdlestone for the purchase from the latter of certain cottages in High Street, Dovercourt, Essex, for 700*l.*, paid a deposit of 50*l.*, and obtained a receipt signed by Girdlestone; but neither the receipt, nor any copy of it, nor any corresponding memorandum was signed by Trefusis.

Girdlestone was in this matter acting on behalf of J. W. F. Daniels, the owner of the property and the undisclosed principal vendor in the matter, but Girdlestone afterwards set up that he had agreed to buy the property from Daniels for 600*l.*, and that in the transaction with Trefusis he was acting on his own account, and sub-selling to him at an increased price.

Correspondence and negotiations then took place between Messrs. Turner, Turner & Martin, solicitors for Daniels, on the one hand, and Messrs. C. R. Taylor, Sons & Harris, solicitors for Trefusis, on the other hand, in the course of which it was arranged or recognized that Daniels was to defend an action brought against him by Girdlestone for specific performance of an alleged contract between them for the sale of the property to Girdlestone for 600*l.*, and it appeared that Trefusis was ready to help Daniels by giving evidence for him in the action of *Girdlestone* v. *Daniels.*

As Trefusis was to buy for 700*l.* and Daniels was to get at any rate 600*l.* of that sum, proposals were discussed between the solicitors of Daniels, the solicitors of Trefusis, and Messrs. Ward & Co., the solicitors of Girdlestone, and substantially agreed to, under which the conveyance of the property was to be made to Trefusis, 600*l.* was to be paid to Daniels, and the balance of the purchase-money was to be placed in joint names to abide the result of *Girdlestone* v. *Daniels.*

In the course of the correspondence above mentioned, Daniels' solicitors, being desirous of obtaining a proof of the evidence to be given by Trefusis in *Girdlestone* v. *Daniels*, wrote a letter to Trefusis' solicitors, dated March 23, 1911, which contained the following passage: "We shall be glad if you will kindly let us have a short statement from your client shewing exactly the course of events between him and Mr. Girdlestone, with a copy of the correspondence. Your client informed us that he had handed the latter over to you. We shall, of course, be happy to pay your proper charges in this matter."

To this Trefusis' solicitors replied by a letter dated March 24, 1911, in which they said: "We will see our client early next week as to his interview with Mr. Girdlestone, and write you thereon." And in a letter dated March 30, 1911, they said: "We enclose herewith statements of Mr. Trefusis and Mr. Hewitt." The statement of Trefusis, which was not signed by him, was as follows: "Having been informed by my secretary, Mr. Hewitt, that he had been to Dovercourt and seen Mr. Girdlestone as to the purchase of a piece of land in the High Street at Dovercourt, I motored down to Dovercourt on February 11. . . . . At about 2.30 on that day I called on Mr. Girdlestone, and discussed with him the terms of purchase of the land. After very considerable discussion I agreed to give him the sum of 700*l.* for the land. I paid him a deposit of 50*l.*, and he signed the receipt now produced by me. This was at about 4.30, and I then left. Mr. Girdlestone did not mention to me that he was acting as agent for any one, but (so far as I can remember) he did say he had a sort of partnership with Mr. Daniels—at least that is what I gathered from the conversation, which was somewhat protracted. I did not pay much attention to what he said in this respect, as I understood I was dealing with a responsible person who had full power to deal with the matter."

This statement was not quite sufficient for Daniels' solicitors, who in a letter of April 1, 1911, to Trefusis' solicitors, said: "We thank you for yours of yesterday with enclosures, and now have pleasure in sending you our cheque, 1*l.* 11*s.* 6*d.*, and are greatly obliged by your courteous assistance herein. There are one or two points upon which we desire to further elucidate matters, and, thinking this can best be done in the form of question and answer, we send a short series of questions herewith. Will you kindly submit them to your client, and obtain his answers to same?"

Trefusis' solicitors in a letter of April 3, 1911, replied as follows: "We have sent a copy of your questions to our client, and have asked for his replies"; and in a letter of April 12, 1911, to Daniels' solicitors, they said: "We have the pleasure to enclose herewith your questions, with the answers of Mr. Trefusis and Mr. Hewitt."

The document, headed "Questions to Hon. S. C. Trefusis," was as follows: "(1.) Did you remain continuously with Mr. Girdlestone from 2.30 P.M. (Saturday, February 11, 1911) until bargain struck and contract signed?" Answer—"Yes." "(2.) If not, then for what period and between what times were you with him?" No answer. "(3.) During the period that you were with him did he despatch any telegram to any one with regard to the sale? If so, when?" Answer—"Not that Mr. Trefusis is aware." "(4.) Can you state definitely that 4.30 P.M. was the latest moment at which you were in Mr. Girdlestone's company? (We mention this because our Mr. Martin understood Mr. Trefusis on the telephone to say the bargain was struck at about 3.30 P.M.)" Answer—"Mr. Trefusis can only fix the time approximately. After leaving Mr. Girdlestone he went to the Dovercourt Hotel to tea." "(5.) If, in answer to question 1, you say you were not continuously in Mr. Girdlestone's company, then will you state for how long, before 4.30 P.M. (assuming that to be the moment you left Mr. Girdlestone), you were continuously in Mr. Girdlestone's company?" No answer. "(6.) Did the discussions and negotiations take place wholly at Mr. Girdlestone's, or where, if elsewhere?" Answer—"Yes." "(7.) Did any period, and if so how long, intervene between the bargain being struck at 700*l.*, and your receiving the receipt for the deposit, &c.?" Answer—"The bargain was struck, and the receipt for deposit given immediately thereafter."

The action of *Girdlestone* v. *Daniels* [1911 G. 486] was heard on November 28, 1911. Trefusis was called as a witness for the plaintiff at the trial and gave evidence, and the action was dismissed with costs.

After and before the hearing of that action Daniels pressed

Trefusis to complete, but was put off on different grounds from time to time, and ultimately he declined to proceed further with the matter.

On December 12, 1911, Daniels brought the present action against Trefusis, alleging that on February 11, 1911, the defendant agreed with Girdlestone, the duly authorized agent in that behalf of the plaintiff, for the purchase by the defendant from the plaintiff of the cottages in High Street, Dovercourt, at the price of 700*l.*, and that the deposit had been received by the plaintiff, and claiming specific performance of the alleged agreement and payment by the defendant to the plaintiff of 650*l.*, the balance of the purchase-money, with interest thereon. The defendant, by his statement of defence, did not admit the alleged agreement, or that Girdlestone was the duly authorized agent of the plaintiff, or that the proposed purchase was by the defendant from the plaintiff; and he alleged that there never was any agreement or any memorandum or note thereof in writing signed by the defendant, or any one by him lawfully authorized, for the purchase of the property; and he relied upon s. 4 of the Statute of Frauds.

At the trial the plaintiff was allowed to amend his pleadings by alleging part performance of the contract, under the following circumstances. Arrangements had been made, during the negotiations, for completing the conveyance of the property to Trefusis on an early day in June, 1911. Two persons were then in possession of the property as weekly tenants. On June 2, 1911, a member of the firm of solicitors acting for Trefusis had an interview with the firm of solicitors acting for Daniels and asked him to get rid of the tenants. He assented to this, and in pursuance of the request gave notice to the tenants, who went out of possession in consequence; and the property afterwards remained vacant.

Romer, K.C., and *J. G. Wood*, for the plaintiff. The statement enclosed in the letter of March 30, 1911, and the questions and replies enclosed in that of April 12, 1911, are, together with the two letters, a note or memorandum of the contract sufficient to satisfy s. 4 of the Statute of Frauds, inasmuch as they constitute a written statement containing, either expressly or by necessary inference, all the terms of the contract: Fry on Specific Performance, 4th ed. s. 504 p. 225. A letter written by a vendor or purchaser to his own solicitor or agent stating the terms of a verbal contract, though not intended for the inspection of the other party, or a letter written by a vendor to his mortgagee, or the admission of a verbal agreement in an answer without setting up the statute in the answer, is a sufficient note or memorandum: *Barkworth* v. *Young.* (1) Where a promise to answer for the debt of another is recited in the will of the promisor, that recital is a sufficient memorandum to satisfy the Statute of Frauds: *In re Hoyle.* (2) A letter written by an agent within the scope of his authority, and referring to and recognizing an unsigned document as containing the terms of a contract made by his principal, is a sufficient memorandum, although the principal has not authorized the agent to sign the letter as a record of the contract: *John Griffiths Cycle Corporation* v. *Humber & Co.* (3) (which was reversed in the House of Lords on different grounds) (4). An entry in the minute-book of a company, signed by the chairman to verify the accuracy of the entry, is a good memorandum of an agreement to employ upon the terms of a draft agreement referred to in the entry: *Jones* v. *Victoria Graving Dock Co.* (5) It is immaterial what the principal's intention was as regards the effect of the agent's signature, and it is sufficient if the agent is a person lawfully authorized as to the signing: *Howard* v. *Braithwaite.* (6) The defendant will probably rely on *Smith* v. *Webster* (7); but that only amounted to a decision that an authority to a solicitor to prepare a draft contract did not include an authority to state, so as to constitute a contract, the heads of information given to him, as materials for the preparation of a formal contract. The memorandum is duly signed by a person lawfully authorized by the party to be charged therewith: see *Schneider* v. *Norris* (8); *Evans* v. *Hoare.* (9) "The statute requires a signature and not a subscription; therefore all that is requisite to satisfy the statute as to the signature is, that the name be inserted by the party"—or his agent to sign—"in such a manner as to govern and authenticate the entire instrument": Fry on Specific Performance, 4th ed. s. 516 p. 231.

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(1) (1856) 4 Drew. 1, 13, 14.

(2) [1893] 1 Ch. 84.

(3) [1899] 2 Q. B. 414.

(4) *Humber & Co.* v. *John Griffiths Cycle Corporation* [1901] W. N. 110.

(5) (1877) 2 Q. B. D. 314.

(6) (1812) 1 V. & B. 202, 207.

(7) 3 Ch. D. 49.

(8) (1814) 2 M. & S. 286.

(9) [1892] 1 Q. B. 593.

But, assuming that there is no memorandum sufficient to satisfy the statute, there has been part performance of the contract, and part performance "by one of the parties to it may, in the contemplation of equity, preclude the other party from setting up the Statute of Frauds, and thus render it, although merely resting in parol, capable of being enforced by specific performance": Fry on Specific Performance, 4th ed. s. 578 p. 255. Where requests for alterations and improvements of the subject-matter of the contract are made by one party and acted on by the other, the acts done by the latter are sufficient part performance to take a case of verbal contract out of the statute: *Dickinson* v. *Barrow*. (1) All that is required is that the acts in question must be such as must be referred to some contract and may be referred to the alleged one: Fry on Specific Performance, 4th ed. s. 582 p. 257.

Martelli, K.C., and *Whitmore Richards*, for the defendant. It is an absurd contention that the defendant can be bound by the unconscious and unintended act of his solicitors in a different transaction. The solicitors were not acting in the matter as agents for the defendant, but as agents for the plaintiff in obtaining a statement from the defendant. They had no authority to enter into any contract on his behalf or to sign any note or memorandum of a contract. *Jones* v. *Victoria Graving Dock Co.* (2) has no application to the present case. There was not, and could not be, in that case, any question as to the authority of the agent. A corporation can only act by its agent, and there an agent had signed a note or memorandum of the agreement. *Smith* v. *Webster* (3) is exactly in point and in our favour. There the defendant had entered into a verbal agreement with the plaintiff for the sale of an inn for 950*l*., and the defendant's solicitor wrote to the plaintiff's solicitor stating that the defendant

(1) [1904] 2 Ch. 339.

(2) 2 Q. B. D. 314.

(3) 3 Ch. D. 49.

had been with him and stated that he had arranged with the plaintiff for the sale of the inn for 950*l.*, and the Court of Appeal held that the letter was not a sufficient note or memorandum within the statute. If a principal writes a letter containing materials enough to shew a contract within the statute, it is immaterial what his intention was in writing the letter. But in the case of an agent it is different; in that case the other party must shew—and the onus lies on him to do it—that the agent was authorized to sign the note or memorandum of a contract as such. The real test is whether, where a solicitor is not expressly authorized to sign any document recognizing the proposed terms, it is within the scope of his authority to sign: *John Griffiths Cycle Corporation* v. *Humber & Co.* (1) No such express authority was given in the present case.

As regards the allegation of part performance, set up so late in the day, the acts relied on must be unequivocally and in their own nature referable to some such agreement as that alleged: Fry on Specific Performance, 4th ed. s. 581 p. 256. The plaintiff ought not to be allowed to set up, for the first time, such a material fact as part performance: *Philipps* v. *Philipps.* (2) [They also referred to *Lester* v. *Foxcroft* (3); *Hamer* v. *Sharp* (4); *Thuman* v. *Best.* (5)]

Romer, K.C., in reply, referred to Fry on Specific Performance, 4th ed. s. 527 p. 236.

Cur. adv. vult.

Dec. 19. SARGANT J. This is an action for the specific performance of an agreement between the plaintiff, by his agent Herbert Girdlestone, and the defendant, for the sale by the plaintiff to the defendant for 700*l.* of certain cottages in the High Street, Dovercourt, Essex, at the price as stated. The only serious defence is one under the Statute of Frauds, namely, that no agreement for such purchase, nor any memorandum or note thereof, was signed by the defendant or any one by him thereunto lawfully authorized. The plaintiff traverses this statement, so far as relates to the signature of a memorandum or note of the purchase, and further—by an amendment, which I allowed him to make at the trial, and which had been foreshadowed at an early stage of the action by certain interrogatories which he had delivered—the plaintiff pleads part performance of the contract.

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(1) [1899] 2 Q. B. 414, 418.
(2) (1878) 4 Q. B. D. 127, 133.
3) (1701) Colles, P. C. 108.
(4) (1874) L. R. 19 Eq. 108.
(5) (1907) 97 L. T. 239.

The facts are somewhat peculiar but not seriously in dispute and are as follows. [His Lordship stated the facts as above stated, down to the reference to the correspondence between the solicitors to the parties and the defendant's giving evidence in *Girdlestone* v. *Daniels*, and continued:] It is in the course of this part of the correspondence that it is alleged by the plaintiff that a sufficient note or memorandum of the contract was signed. Further, inasmuch as the defendant was admittedly to buy for 700*l.* and the plaintiff was to get, if not the whole of the sum, at any rate 600*l.* of it, proposals were discussed between Messrs. Turner & Co., Messrs. Taylor & Co., and Messrs. Ward & Co., the solicitors of Mr. Girdlestone, and substantially agreed to, under which the conveyance was to be made to the defendant, 600*l.* was to be paid to the plaintiff, and the balance of the purchase-money was to be placed in joint names to abide the result of the litigation between the plaintiff and Mr. Girdlestone. It is in the course of this part of the correspondence that those matters were arranged and carried out which are alleged to amount to a part performance of the contract. I will deal with these two incidents separately, but in the meantime it should be stated that Mr. Girdlestone's action against the plaintiff was heard on November 28, 1911, that the defendant was called as a witness by the plaintiff and gave evidence, and that in the result that action was dismissed with costs. After as well as before the hearing of the action the plaintiff pressed the defendant to complete, but was put off on different grounds from time to time; and ultimately the defendant has declined to proceed further with the matter and has set up the technical defence I have already referred to.

Some question has arisen with regard to the extent of the agency of Messrs. Taylor & Co., as the solicitors of the defendant, and particularly as to the interpretation to be placed on two answers to interrogatories put in by the plaintiff; but after some discussion it was agreed between counsel that these answers admitted a general authority on the part of Messrs. Taylor & Co. as solicitors of the purchaser (*a*) to act in the matter of the purchase or intended purchase, and (*b*) to arrange for tenants to quit the property agreed or intended to be purchased; but did not admit any special authority (apart from the preceding general authority) to write particular letters. It is, however, of course competent to me to deduce any such authority as to any particular letters from the surrounding circumstances.

As regards the alleged signature of a note or memorandum of the agreement the facts are as follows. Messrs. Turner & Co., being desirous to obtain a proof of the evidence that the defendant could give, approached him for that purpose through Messrs. Taylor & Co., as the solicitors acting for him, by a letter of March 23, 1911. [His Lordship read the passages in the letters of March 23, 24, 30, and April 1, 3, 12, 1911, above set out, and continued:] The document enclosed in the letter of April 12, 1911, has on it pencil remarks which from internal evidence I should gather to have been made by the defendant himself, since they contain rough notes (of which one at least is in the first person) to the like effect as the more formal replies subsequently written in ink. And, if there were any real doubt as to the agency of Messrs. Taylor & Co. in the matter, this would tend to support the fact of agency. But as there seems to me to be sufficient evidence apart from this, I only note this in passing.

The statement enclosed in the letter of March 30, 1911, and the questions and replies enclosed in the letter of April 12, 1911, are, together with those two letters themselves, the note or memorandum of the contract relied on by the plaintiff at the hearing as sufficient to satisfy the Statute of Frauds. That the materials in those documents are sufficient to satisfy the statute is not disputed on behalf of the defendant. The objections urged on his behalf are two only, namely, (1.) that Messrs. Taylor & Co. were not in fact acting in the matter as the agents of the defendant, since they were simply acting as the agents of the plaintiff for the purpose of obtaining a statement or proof from the defendant, and (2.) that in any case the authority of Messrs. Taylor & Co. did not extend to signing a note or memorandum of the contract on behalf of the defendant.

As regards the first objection, no doubt the main object of the letters and documents in question was to obtain something for the plaintiff from the defendant. But for this purpose Messrs. Turner & Co. thought it right, and it was certainly in accordance with the ordinary professional etiquette in these matters, to approach the defendant through Messrs. Taylor & Co. as being the defendant's solicitors and agents in the general transaction, and persons who would prevent his making any statement which might be against his interests. This mode of procedure obviously commended itself to Messrs. Taylor & Co. and the defendant, and was concurred in by them. And the fact that Messrs. Taylor & Co.'s costs in this particular matter were paid by the plaintiff through Messrs. Turner & Co. is only one feature of the case, and is easily explicable when one considers that the defendant was being asked for a favour and of course was entitled to be indemnified against any costs he might incur to his solicitors in the course of being protected in conferring that favour. In my judgment, therefore, the first objection is untenable.

The second objection is more formidable and is supported at first sight by the well-known case of *Smith* v. *Webster*. (1) But when that case is carefully examined, both on its own facts and in the light of the two subsequent cases of *Jones* v. *Victoria Graving Dock Co.* (2) and *John Griffiths Cycle Corporation* v. *Humber & Co.* (3) (a case which was reversed in the House of Lords on entirely different grounds), it becomes apparent that the present case is not within it. *Smith* v. *Webster* (1) really decided that the authority of a solicitor to prepare a draft contract did not include, and indeed was inconsistent with, an authority to state, in a binding form and so as to constitute a contract, the rough heads of information which had been given by the client to the solicitor as material on which to draw the formal contract. But here the authority was not a general authority at all, but an authority to forward to the plaintiff's advisers certain particular documents. And although the defendant may not have been contemplating that those documents would form a note or memorandum of the contract sufficient to satisfy the Statute of Frauds (indeed nothing could have been further from his thoughts), that did not in my judgment invalidate the authority to forward the documents, or prevent all those legal consequences flowing from the forwarding which would undoubtedly have flowed from it had the defendant forwarded the statements himself and signed the letters enclosing them. It seems to me that the unintentional by-product of satisfying the Statute of Frauds may be produced as completely by a note or memorandum signed by an agent of the party as by a note or memorandum signed by the party himself, provided, of course, that the agent had authority to sign the particular note or memorandum. Mr. Martelli indeed urged that Messrs. Taylor & Co. had no authority to sign the letters enclosing the two statements, since they might have been sent without any accompanying letter or signature. But I do not think that this argument is sound in a case like the present, where the normal and usual method of communicating the two statements was adopted, namely, by means of the post and by enclosing them in letters referring to or indicating the enclosures. I am therefore of opinion that the letters and statements in question are sufficient to satisfy the statute.

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(1) 3 Ch. D. 49, 56.

(2) 2 Q. B. D. 314.

(3) [1899] 2 Q. B. 414.

I have still to deal with the question of part performance. At a certain period of the negotiations arrangements had been made for completing the conveyance to the defendant, on the terms I have already indicated, on some day early in the month of June, 1911. There were two weekly tenants of the property in question. On June 2 a member of the firm of Taylor & Co., the solicitors of the defendant, had an interview with Mr. Martin, of the firm of Turner & Co., the plaintiff's solicitors, and asked him to get rid of the tenants. Mr. Martin assented to this, and in pursuance of the request gave notice to the tenants, who went out of possession in consequence, and the property has remained vacant since. In my judgment this incident constitutes an act of part performance as unequivocally referable to the contract as if the defendant had taken possession of part of the property It was in fact a step towards putting him into actual vacant possession at an earlier date than he could otherwise have

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obtained it. On this point also, therefore, my decision is in favour of the contention of the plaintiff.

Accordingly I give judgment for the plaintiff for specific performance as asked. The title has been accepted, and the form of conveyance agreed and already executed by the plaintiff as an escrow, and the decree will therefore be in a very simple form. I reserved any question of costs when I allowed the amendment to which I have referred, but no extra cost has actually been occasioned by that amendment, and I see no sufficient reason for depriving the plaintiff of any of the costs to which he is prima facie entitled as having succeeded in the action—particularly in view of the highly technical nature of the defence.

Solicitors for plaintiff: *Elvy Robb & Welch, for Turner, Turner & Martin, Ipswich.*

Solicitors for defendant: *C. R. Taylor, Sons & Harris.*

F. G.

SARGANT J. 1914 *March* 3.

In re BENJAMIN COPE & SONS, LIMITED.

MARSHALL *v.* BENJAMIN COPE & SONS, LIMITED.

[1910 B. 966.]

Company—Debentures—Floating Charge—Reservation of Power to Company to "mortgage" or deal with its Property—Subsequent Floating Charge—Priority.

A company in 1894 created a series of debentures headed "Issue of Debentures for 2000*l.*" By clause 5 of each debenture the company charged, with payment of 100*l.* and interest, "its undertaking and all its property both present and future (subject to any mortgages now affecting or which may hereafter affect the same or any part thereof)." Clause 6 stated that the debenture was one of a series of twenty debentures for 100*l.* each, and that "all such debentures shall rank pari passu without regard to the date of issue thereof"; and clause 7 provided that "notwithstanding the charge hereby created, the company may, in the course of its business and for the purpose of carrying on the same, deal with its property as it may think fit, and in particular may mortgage and sell the same or any part thereof."

In 1904 the company created a second series of debentures, each in the same form as those of the first series, except that each debenture was headed "Second Issue of Debentures for 2000*l.*," and that clause 6

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stated that the debenture was one of "a second series of twenty debentures for 100*l.* each," and that "all of such debentures, of this and the first series, shall rank pari passu without regard to the date thereof":—

Held, that the second debentures did not rank pari passu with the first debentures, but after them.

Benjamin Cope & Sons, Limited, a company limited by shares and incorporated under the Companies Act, 1862, in 1894 created a series of twenty debentures for 100*l.* each. Each debenture was headed with the name of the company and the words "Issue of Debentures for 2000*l.*"

By clause 1 the company covenanted to pay the holder, on demand, 100*l.*, with interest at 5*l.* per cent. per annum.

By clause 2 the company covenanted to pay interest in the meantime.

Clause 3 provided that the lender should not demand payment of his principal without twelve calendar months' previous written notice of his intention to demand payment, unless a half-year's interest should be in arrear for three calendar months, or a resolution should be passed or an order should be made for the winding up of the company.

Clause 4 provided that, in the absence of such demand as afore said, the company should not be entitled to pay the principal without twelve calendar months' previous notice in writing.

The rest of the debenture (which had no conditions annexed) was as follows:

"5. The company hereby charges with the payment of the said sum and interest its undertaking, and all its property, both present and future (subject to any mortgages now affecting or which may hereafter affect the same or any part thereof).

"6. This debenture is one of a series of twenty debentures, for 100*l.* each, issued or intended to be issued by the company, and numbered or intended to be numbered 1 to 20 (inclusive), and all such debentures shall rank pari passu without regard to the date of issue thereof.

"7. Notwithstanding the charge hereby created, the company may, in the course of its business and for the purpose of carrying on the same, deal with its property as it may think fit, and in particular may sell and mortgage the same or any part thereof, pay and receive money, and declare and pay dividends out of profits."

All the twenty debentures were issued, and they were all outstanding at the commencement of this action.

In 1904 the company created another series of twenty debentures of 100*l.* each.

Each of these debentures was headed with the name of the company and the words "Second Issue of Debentures for 2000*l.*"

Clauses 1 to 5 of each debenture of the second series were in the same words as clauses 1 to 5 of the debentures of the first series.

Clause 6 was as follows: "This debenture is one of a second series of twenty debentures for 100*l.* each, issued or intended to be issued by the company, and numbered or intended to be numbered 22 to 40 (inclusive), and all of such debentures, of this and the first series, shall rank pari passu without regard to the date of issue thereof."

Clause 7 was in the same words as clause 7 of the debentures of the first series.

In an action by two holders of debentures of the first series (on behalf of themselves and all other holders of mortgage debentures in the defendant company) against the company, for the enforcement of the security, the Master certified that fifteen of the debentures of the second series had been issued, one of which had been subsequently redeemed, and that the second issue of debentures ranked pari passu with the first issue.

Mrs. Mary Styles was the holder of five debentures of the second series. She had been served with notice of the judgment in the action by the direction of the Master, in order that there might be some one to represent the second debenture holders on the question, and had entered an appearance in the action and attended before the Master.

The plaintiffs served a summons on the company and Mrs. Styles asking that the Master's certificate might be varied so that it might certify that the first issue of debentures ranked in priority to the second issue; and this summons was adjourned into Court.

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BENJAMIN COPE & SONS, LIMITED, *In re.*
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Jenkins, K.C., and *J. S. Green*, for the plaintiffs. The debentures of the first series have priority over those of the second series. The heading of the debentures of the first series shews that the series is limited to debentures for an aggregate principal sum of 2000*l.* only. Then there is a charge on all the company's present and future property, which, it is true, is made subject to any present or future "mortgages," which means mortgages of specific assets. Clause 6 makes the twenty debentures of the first series, and those only, rank pari passu. Clause 7 writes out at large what would now be sufficiently expressed by giving simply a "floating charge." The word "mortgage" occurs again in this clause, and must be read as meaning a mortgage of specific assets. The result of the whole debenture is that the holder obtains a floating charge. That charge is a first charge, for a mortgage may be a first mortgage although it does not say that it is. Now a floating charge can only be displaced by a dealing in the ordinary course of business, or by a sale or mortgage of a specific asset, or the happening of some other event expressly provided for: *In re Panama, New Zealand, and Australian Royal Mail Co.* (1); *In re Florence Land and Public Works Co.* (2) In *In re Colonial Trusts Corporation* (3) Jessel M.R. said: "It would be a monstrous thing to hold that the floating security prevented the making of specific charges or specific alienations"; and in *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (4) North J. held that a floating charge could be displaced by a deposit of title deeds and a written agreement charging the property comprised therein with payment of money advanced and applied to the purposes of the company. But the Courts have never gone further than that, and have never held that a floating charge can be displaced by a subsequent floating charge.

If our contention is upheld, that "mortgage" in the debentures of the first series means a mortgage of specific assets, the company could not put the debentures of the second series before those of the first series, nor could it—as it purports to do by clause 6 of the debentures of the second series

(1) (1870) L. R. 5 Ch. 318.
(2) (1878) 10 Ch. D. 530.
(3) (1879) 15 Ch. D. 465, 472.
(4) (1885) 29 Ch. D. 715.

—make those debentures rank pari passu with the debentures of the first series, for the debentures of the second series themselves only give a floating security. A "floating security"—such a security as the debentures of the first series gave—is defined or described by Lord Macnaghten in *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (1) and in *Illingworth* v. *Houldsworth.* (2) Although it floats with or hovers over the property to which it relates, it is, nevertheless, a security, and one which is not affected by a security of a similar nature subsequently given.

Bovill, for Mrs. Styles. Putting aside for the moment the consideration of what is the effect of a floating charge, one has to inquire what bargain was made between the company and the holders of the first debentures. It was that, notwithstanding the security given to them, the company was to be able to borrow money for the purposes of its business, and give a security for that money having priority over the debentures of the first series. If it could do that, it could do something less, that is to say, it could give a security ranking pari passu with the existing debentures. Those debentures did not purport to give a "first charge" but only a charge, and that is made subject to "any mortgage" "which may hereafter affect" the property charged. A second floating charge is a mortgage within the meaning of clauses 5 and 7 of the debentures of the first series; it is a charge upon the property from the moment it is given: *Wallace* v. *Evershed.* (3) A floating charge is as much a mortgage as the equitable security given by a deposit of title deeds, and it is a misdescription to say that it "hovers." The security does not hover; it is the property affected by it that moves about. It is not unusual to reserve power to create a floating charge ranking in priority to or pari passu with one previously given: Palmer's Company Precedents, 11th ed. pt. iii. p. 328.

SARGANT J. This is a summons to vary the Master's certificate. The point raised is a short one, and I wonder that it has not been determined long ago.

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(1) [1897] A. C. 81.
(2) [1904] A. C. 355.
(3) [1899] 1 Ch. 891, 894.

The company has created two separate series of debentures. The debentures of the first series were issued in 1894 and each of them was headed with the words "Issue of Debentures for 2000*l.*" After covenants for payment of principal and interest, and provisions as to notices, the debenture proceeds, in clause 5, to charge the principal and interest on the company's present and future property, "subject to any mortgages now affecting or which may hereafter affect the same or any part thereof." Then clause 6 says that the twenty debentures of the series are all to "rank pari passu without regard to the date of issue thereof." Clause 7 provides that, notwithstanding the charge, "the company may, in the course of its business and for the purpose of carrying on the same, deal with its property as it may think fit, and in particular may sell and mortgage the same or any part thereof."

Ten years afterwards, when all the debentures of the first issue were outstanding, the company created a second series of debentures, each of which was headed "Second Issue of Debentures for 2000*l.*" Clause 6 of each of these debentures stated that the debenture was "one of a second series of twenty debentures for 100*l.* each," and that "all of such debentures, of this and the first series, shall rank pari passu without regard to the date of issue thereof." The rest of the clauses are in the same words as the debentures of the first series.

All the debentures of the first series and fourteen of those of the second series are outstanding, and the Master has certified that the fourteen rank pari passu with the debentures of the first series.

Whether this decision is right or wrong depends on the answers to be given to two questions, namely, (1.) whether in general a company has power to create a second floating charge ranking pari passu with a first floating charge; and (2.) whether in this particular case the words of the first debentures are sufficient to alter the general rule.

Floating charges appear to have originated through the Courts having recognized that companies may validly charge the whole of their undertaking and assets, and having given practical effect to such a charge. To treat such a security as constituting a specific charge on the property of the company at the date of the charge itself would paralyse the business of a company, since the assent of the chargee, or of the whole body of chargees, would then be necessary to any sale or other disposition of any part of the property of the company in the course of carrying on its business. And accordingly the Courts solved the problem by treating such a charge, not as being specific or fixed, but as being ambulatory and attaching to the property for the time being of the company at the time when the charge came to be enforced (*In re Panama, New Zealand, and Australian Royal Mail Co.* (1); *In re Florence Land and Public Works Co.* (2)). It would not have been incompatible with this solution of the problem that the company, while left at liberty to sell and deal with their assets in most ways, should have been precluded from making specific mortgages or charges of parts of their property in priority to, or competition with, the floating charge. And this view seemed to commend itself to Giffard L.J. in *In re Panama, New Zealand, and Australian Royal Mail Co.* (3), and has been shewn to be a quite workable view by the not uncommon adoption of a well-known form of floating security which in terms prohibits specific mortgages or charges. But the law was definitely settled the other way in *In re Colonial Trusts Corporation* (4) and *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (5)

Ever since those cases it has been generally recognized that a floating security can be displaced by a specific legal or equitable mortgage. But does it follow that it can be displaced by a subsequent floating charge in the absence of words in the first charge authorizing such a displacement? Nothing in the reported cases has carried the matter so far, and in so laying down the law I should, I believe, be acting contrary to all professional and commercial views on the subject—and it must be remembered that these debentures are commercial instruments.

If the above view is true in the case of an ordinary floating charge, is there anything in the present case which prevents me

(1) L. R. 5 Ch. 318.
(2) 10 Ch. D. 530.
(3) L. R. 5 Ch. 322.
(4) 15 Ch. D. 465.
(5) 29 Ch. D. 715.

from saying that the debentures of the first series are entitled to priority? I am not sure that the words here used are not more strongly in favour of the first debenture holders than those of the forms ordinarily in use. The word "mortgage," apparently in contradistinction to the word "charge," is used in both clause 5 and clause 7 of the debentures of the first series, and in the latter clause the mortgages and other dealings allowed to be made by the company must be "in the course of its business and for the purpose of carrying on the same." That was the sole object of the power, and I do not think that this second issue of debentures giving a floating charge fairly comes within the words of clause 7.

There are other indications in favour of the contention on behalf of the first debenture holders. The fact that the first debentures constitute a series which is limited to 2000*l.* is destructive of the suggestion that any future debentures giving a floating charge can be put before, or be made to rank pari passu with, the debentures of the first series. And, generally speaking, it would in my view be as incompatible with the company's bargain with the first debenture holders to put their debentures behind or on the same footing as subsequent debentures giving a charge of the same character as if the debentures had constituted a specific charge and it were then attempted to create a subsequent specific charge ranking pari passu with them or in priority to them.

I hold, therefore, that the first debentures have priority over the second debentures. (1)

Solicitors for plaintiffs: *Smiles & Co., for Enoch Evans & Son, Walsall.*

Solicitors for Mrs. Styles: *Gibson & Weldon, for J. H. Baxter, Willenhall.*

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(1) Compare *Smith* v. *English and Scottish Mercantile Investment Trust* [1896] W. N. 86, which is to the same effect.—F. E.

F. E.

SARGANT J.

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March 12, 13,

CLEGG *v.* METCALFE.

[1913 C. 1567.]

Burial—Extension of Parish Churchyard—Interment within One Hundred Yards of a Dwelling-house—Burial Act, 1855 (18 & 19 *Vict. c.* 128), *s.* 9—*Consecration of Churchyards Act*, 1867 (30 & 31 *Vict. c.* 133).

Sect. 9 of the Burial Act, 1855, which provides that "no ground not already used as or appropriated for a cemetery shall be used for burials under the" Burial Acts, 1852 to 1855, "within the distance of one hundred yards from any dwelling-house, without" the consent of the owner, lessee, and occupier thereof, does not, in the case of a consecrated extension (under the Consecration of Churchyards Act, 1867) of a churchyard, even where such consecrated extension is within an area in which an Order in Council has been made providing that no new burial ground is to be opened without the previous approval of the Local Government Board, give the owner of a dwelling-house within 100 yards a separate individual right to object to and prohibit the user of the ground for burials without his consent in writing.

Greenwood v. *Wadsworth* (1873) L. R. 16 Eq. 288 not followed.

Semble, that no such separate or individual right is given except in the case of land appropriated or used as a burial ground or as an additional burial ground under the Acts themselves.

THE district parish of Mytholmroyd, which formed part of the ancient parish of Halifax, was, by an Order in Council dated February 25, 1846 (made under the New Parishes Act, 1843), formed as a separate district for ecclesiastical purposes out of the ancient parish. There was not at that time any actual church or chapel in the area constituted as the district parish, but a church was soon afterwards built and consecrated as the parish church of the district parish, and attached to the church was a churchyard, which became the churchyard of the district parish.

By an Order in Council dated February 3, 1858 (amended by Orders in Council of March 11, 1858, and August 3, 1858), it was ordered, in pursuance of s. 1 of the Burial Act, 1853, that no new burial ground should be opened within the limits of the parish of Halifax without the previous approval of one of Her Majesty's principal Secretaries of State; and by s. 4 of the Burial Act, 1900, the powers and duties of the Secretary of State under s. 1 of the Act of 1853 were transferred to the Local Government Board.

In December, 1908, about a third of an acre of land adjoining the existing churchyard of the district parish was acquired by the vicar and churchwardens as and for an addition to and extension of the churchyard, and under the Consecration of Churchyards Act, 1867, this piece of land was conveyed for the purpose in January, 1910, and the land was consecrated in February, 1910. The whole of this land was within 100 yards of three dwelling-houses in Church Street, in the district parish, which were owned by one Samuel Clegg, who occupied one of the houses, and at one time he consented to that portion of the extension of the churchyard which was nearest to his houses being used for burials. That portion having been filled by burials, the vicar and churchwardens allowed, and claimed the right to allow, burials in parts of the rest of the extension as to which Clegg had not given any consent.

Clegg commenced the present action against the vicar and churchwardens, alleging that using "the new burial ground," or suffering and permitting the same to be used, for burials within 100 yards from his houses, or any of them, without his consent in writing, was contrary to s. 9 of the Burial Act, 1855, and he claimed a declaration to that effect and an injunction to restrain the defendants and each of them, their and his agents and servants, from using, or suffering or permitting to be used, for burials any part of the new burial ground within 100 yards from his houses without his consent in writing.

The action was tried on March 12 and 13, 1914.

Romer, K.C., and *J. Brooke Little*, for the plaintiff. The land forming the extension of the churchyard is a burial ground which is subject to the provisions of the Burial Acts. The Burial Act, 1852 (15 & 16 Vict. c. 85), was passed to amend the laws relating to the burial of the dead in the metropolis. Sect. 2 of that Act enabled Orders in Council to be made that, "for the protection of the public health," burials in burial grounds or places of burial should be discontinued wholly, or subject to exceptions and qualifications. By s. 4 it was made unlawful, after the time mentioned in the Order in Council, to bury the dead in any "church, chapel, churchyard, or burial place, or elsewhere" within the area covered by the Order, except as in the Act or the Order excepted. Sect. 6 saved certain rights to bury in vaults, in or under churches and chapels, and in churchyards or burial grounds affected by an Order in Council, and by s. 9 "no new burial ground or cemetery (parochial or non-parochial)" was to be provided and used in the metropolis or within two miles of any part of it without the previous approval of "one of Her Majesty's principal Secretaries of State." The powers of this and other sections of the Burial Acts, 1852 to 1871, were, as from January 1, 1901, transferred to the Local Government Board by s. 4 of the Burial Act, 1900 (63 & 64 Vict. c. 15). Where the place of burial appeared to the ratepayers "insufficient or dangerous to health," s. 10 of the Act of 1852 provides for a resolution being passed at a vestry meeting "that a burial ground shall be provided under this Act for the parish," and a copy of this resolution has to be sent now to the Local Government Board. Sect. 11 provides for the constitution, where such a resolution has been passed, of a burial board; and ss. 12—24 provide the machinery for working burial boards. Sect. 25 required the burial board forthwith to provide a burial ground for the parish, and for the first time conferred on the owners, lessees, and occupiers of dwelling-houses in the metropolis the privilege of objecting to the appropriation of ground (not already used or appropriated as a cemetery) "as a burial ground, or as an addition to a burial ground under this Act, nearer than two hundred yards" to the house, unless their consent in writing had been obtained. The question was raised whether this provision applied to a case where the burial ground was not subject to a burial board: see *Greenwood* v. *Wadsworth*.(1) Sect. 26 of the Act of 1852 gave burial boards powers to acquire land for burial grounds, and s. 52 may or may not be relevant as defining terms used in the Act. The Act of 1852 was soon extended to burials beyond the limits of the metropolis. Sect. 1 of the Burial Act, 1853, 16 & 17 Vict. c. 134 (as amended by the Act of 1900), provides that the Sovereign—upon the representation of the Local Government Board that "for the protection of the public health the opening of any new burial ground in any city or town, or within any other limits save with the previous approval of the" Local Government Board, "should be prohibited," or that burials therein should be discontinued or discontinued subject to any exception or qualification—may by Order in Council forbid the opening of any new burial ground within that area, or direct the discontinuance of burials therein. This enactment makes a like provision as to extra-metropolitan burial places as that made as to intra-metropolitan burial places by ss. 2 and 9 of the Act of 1852. Sect. 3 of the Act of 1853 contains a prohibition as to burials in extra-metropolitan areas similar to that in s. 4 of the Act of 1853 with reference to burials in intra-metropolitan burial places. Sect. 4 of the Act of 1853 contains a saving as to vaults, and s. 6 says that " where by any Order in Council as aforesaid it is ordered that no new burial ground shall be opened in any city or town, or within any limits therein mentioned, without the previous approval of" the Local Government Board, " no new burial ground or cemetery (parochial or non-parochial) shall be provided and used in such city or town, or within such limits, without such previous approval." That section is of general application and applies to the extension of the churchyard in the present case. Sect. 7 extends certain provisions (including s. 25 of the Act of 1852) to parishes outside the metropolis, so that the 200 yards limit was applied to extra-metropolitan burial grounds. Sect. 12 of the Burial Act, 1854 (17 & 18 Vict. c. 87), altered the provision in s. 25 of the Act of 1852 as to the 200 yards limit, whether applicable to burials within or without the metropolis, and substituted a prohibition of burials " nearer than one hundred yards to any dwelling-house, without such consent as aforesaid." This section was itself repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), s. 1. In the meantime the prohibition as to burying within 200 yards had been repealed by s. 9 of the Burial Act, 1855 (18 & 19 Vict. c. 128), which proceeded to enact that "no ground not already used as or appropriated for a cemetery shall be used for burials under the said Act"—the Act of 1852—" or this Act, or either of them, within the distance of one hundred yards from any dwelling-house, without such consent as aforesaid," that is to say, the consent in writing of the owner, lessee, and occupier of the dwelling-house. Having regard to these sections, it is illegal for any one to use land for burials within the 100 yards limit without the consent mentioned, whether the burial place is within or without the metropolis.

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(1) L. R. 16 Eq. 288.

We say that this extension of a district churchyard is a burial place within the section referred to; and it has been laid down by Malins V.-C. in *Greenwood* v. *Wadsworth* (1) that the words of the Burial Acts prohibiting the appropriation as a burial ground of land within the 100 yards limit are of general application and are not restricted to grounds established by burial boards under the Act. It is inconceivable that Sanitary Acts like the Burial Acts should apply to new burial grounds laid out by burial boards and not to other burial grounds.

[SARGANT J. In a note on s. 9 of the Act of 1855 in Mr. Brooke Little's Law of Burials, 3rd ed. p. 208, after a criticism of the decision in *Greenwood* v. *Wadsworth* (1), the author says: "And it is submitted that that decision is erroneous." And in Halsbury's Laws of England, title "Burial and Cremation," vol. iii. p. 464, note (*p*), the author of the article says: "It is . . . . generally thought that the decision in *Greenwood* v. *Wadsworth* (1) . . . . was wrong." And at p. 512, note (*q*), he says: "In that case"—*Lord Cowley* v. *Byas* (2)—"it was assumed, as had been decided by Malins, V.-C. in *Greenwood* v. *Wadsworth* (1), that actual interment in a private cemetery within a certain distance of a dwelling-house was prohibited by s. 9 of the Burial Act, 1855; but the correctness of this decision is generally doubted."]

Sect. 25 of the Act of 1852 was not incorporated per incuriam by s. 7 of the Act of 1853, for it is repealed and re-enacted with an amendment by s. 9 of the Act of 1855, and the effect of s. 7 of the Act of 1853 is that s. 25 of the Act of 1852 applied to every burial ground in every parish outside the metropolis whether an Order in Council had been made or not. In *Lord Cowley* v. *Byas* (2) the Court of Appeal assumed that s. 9 of the Act of 1855 applied to a cemetery which had not been formed by a burial board.

[SARGANT J. The successful appellant's counsel were stopped

(1) L. R. 16 Eq. 288.

(2) (1877) 5 Ch. D. 944.

by the Court, and had no need to argue that the case was not within s. 9.]

The Orders in Council of 1858 refer to the large and ancient parish of Halifax and include all the area of it, including the district parish of Mytholmroyd, which had been carved out of it for the purpose of making a district parish.

Ernest Charles, K.C., and *F. H. L. Errington*, for the defendants. No case has been decided which shews that an extension of a churchyard consecrated under the Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133), as the land in this case was, may not be used for the purposes for which it was consecrated, or that it is subject to the Burial Acts. The extension may be adjoining in the sense that it actually touches the old churchyard, or may be near it only, by reason of its being separated by a highway: *In re Baroness Bateman and Parker's Contract.* (1) The extension in this case is not a new burial ground within the meaning of the Burial Acts; the consecration makes it a part of the old churchyard. The only part of s. 9 of the Act of 1855 which is unrepealed is that which says that ground not already used or appropriated "for a cemetery" shall not be "used for burials under the said Act"—the Act of 1852—"or this Act" within the limit of 100 yards without such consent as aforesaid. But the churchyard is not a cemetery under the Acts, and the burials in the churchyard are not burials under the Burial Acts, which are only those made in grounds governed by burial boards.

Sect. 25 of the Act of 1852 requires a burial board to provide a burial ground, and it is only with regard to ground so provided by burial boards that the section imposes a limit as to the ground not being nearer than a certain distance from a dwelling-house unless certain consents are obtained, and the subsequent Acts, applying the restriction of 100 yards, do not extend the provision except to grounds governed by burial boards. Sect. 25 of the Act of 1852 certainly could not apply to Church of England property in the shape of churchyards, for these were not under the jurisdiction of burial boards, but were under a quite different jurisdiction. The Local Government Board has no right, under s. 8

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(1) [1899] 1 Ch. 599.

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of the Act of 1855, to inspect churchyards. The churchyard is not a cemetery within the meaning of the Burial Acts, and no burial board has any powers over it, or over its headstones, or monuments, or pathways. This district parish is not "a parish" as defined by s. 52 of the Act of 1852. *Greenwood* v. *Wadsworth* (1) is difficult to understand, but it does not apply to the present case.

The Order in Council of February, 1858, did not apply at all to the district parish of Mytholmroyd, for at that time Mytholmroyd had ceased to be part of the parish of Halifax. There was no consecrated church or chapel in Mytholmroyd when it was constituted a separate district under the New Parishes Act, 1843 (6 & 7 Vict. c. 37), and making it a separate district did not of itself make it a new parish; but a church was shortly afterwards built, which was consecrated in 1848, and thereupon it became a new parish for ecclesiastical purposes by virtue of s. 15 of the Act of 1843. The unit for civil purposes under the Order of 1858 was not the ancient parish of Halifax, but one or other of the twenty-three townships of which that parish was composed, and the effect of the severance of Mytholmroyd from the parish of Halifax was that it was no part of the area to which the subsequent Order referred. There is a distinction between Mytholmroyd and certain other districts referred to in the Order of February, 1858, and the Orders amending it, for the other districts had only had chapels of ease built for them and were not completely severed from the old parish for ecclesiastical purposes. We do not contend that the Secretary of State could not close part of a churchyard for burials. Sects. 1 and 3 of the Act of 1853 seem to be of general application, but the latter section distinguishes between a "churchyard" and a "burial place."

Where it is intended that burials within a certain distance from a dwelling-house in burial places not under a burial board shall be prohibited, the Legislature says so in express terms: see the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 10. There is a special code as to burials in new churchyards: see the Church Building Act, 1819 (59 Geo. 3, c. 134), ss. 37, 38, and the Church Building Act, 1822 (3 Geo. 4, c. 72), s. 8.

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(1) L. R. 16 Eq. 288.

Romer, K.C., in reply.

Cur. adv. vult.

March 18. SARGANT J. In this action the plaintiff, as the owner of three dwelling-houses in Church Street, in the district parish of Mytholmroyd, in the county of York, and as occupier of one of those dwelling-houses, seeks to prohibit the defendants, as the vicar and churchwardens of the said district parish, from using or allowing to be used for burials an addition which has been recently made to the churchyard of the said district parish, and which is situate within a distance of 100 yards of the plaintiff's dwelling-houses. The right to the prohibition is based on s. 9 of the Burial Act, 1855, but in order to thoroughly understand that section it is necessary also to refer to certain prior legislation.

The first of these Acts is the Burial Act, 1852, which related exclusively to the metropolis as therein defined. By s. 2 of that Act power was given to prescribe by Order in Council that burials should be discontinued, either wholly, or with any exception or qualification, in any part or parts of the metropolis, or in any burial ground or places of burial in the metropolis. By s. 9 it was enacted that no new burial ground or cemetery (parochial or non-parochial) should be provided or used in the metropolis or within two miles of any part thereof without the previous approval of one of the principal Secretaries of State. By ss. 10 to 24 provision was made for the formation of burial boards for the parishes in which the place or places of burial should appear to the ratepayers insufficient or dangerous to health (whether any Order in Council in relation to any burial ground in such parish had or had not been made), and by s. 25, which is the vital section for the present purpose, it was enacted as follows: "Every burial board shall, with all convenient speed, proceed to provide a burial ground for the parish or parishes for which they are appointed to act, and to make arrangements for facilitating interments therein; and in providing such burial ground the board shall have reference to the convenience of access thereto from the parish or parishes for which the same is provided; and any such burial ground may be provided either within or without the limits of the parish, or all or any of the parishes, for which the same is provided; but no ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground, or as an addition to a burial ground, under this Act, nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house."

The Burial Act, 1853, enabled the application to other populous parts of the country of provisions similar to those of the Act of 1852. By s. 1 of the Act an Order in Council might prescribe that no new burial ground should be opened in any city or town, or within any other limits, without the previous approval of one of the principal Secretaries of State, or (as the case might require) that burials in any city or town, or within any limits, or in any burial grounds or places of burial, should be discontinued, either wholly or subject to any exceptions or qualifications. And by s. 7 of the Act the provisions contained in ss. 10 to 42 inclusive, and in certain other sections of the Burial Act, 1852, were extended to extra-metropolitan parishes. By the Burial Act, 1854, s. 12, it was provided that s. 25 of the Act of 1852 was not to apply either to burial grounds provided under that Act or to burial grounds provided under the Act of 1853, and in lieu thereof it was enacted as follows, namely, " So much of the said Act of the fifteenth and sixteenth years of Her Majesty, as enacts that 'no ground (not already used as or appropriated for a cemetery) shall be appropriated as a burial ground or as an addition to a burial ground under that Act nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house,' shall not extend or be applicable to or in respect of any burial grounds which have been or may be provided under the said Act of the last session and this Act, or either of them, or to or in respect of any addition which has been or may be so provided to any burial ground; but no ground not already used as or appropriated for a cemetery shall be appropriated under the said Act of the last session and this Act, or either of them, as a burial ground, or as an addition to a burial ground, nearer than one hundred yards to any dwelling-house, without such consent as aforesaid."

The Burial Act, 1855, made further additions to and amendments of the provisions of the Burial Acts of the three preceding years. And by s. 9 of that Act it was provided as follows: "So much of the said Act of the fifteenth and sixteenth years of Her Majesty as enacts that 'no ground (not already used as or appropriated for a cemetery) shall be appropriated as a burial ground, or as an addition to a burial ground, under that Act nearer than two hundred yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house,' shall be repealed; but no ground not already used as or appropriated for a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of one hundred yards from any dwelling-house, without such consent as aforesaid." It was held in *Lord Cowley* v. *Byas* (1) that this section in effect repealed s. 12 of the Burial Act, 1854, and since then this latter section, as well as the earlier part of s. 9 of the Burial Act, 1855, has been repealed by the Statute Law Revision Act, 1892. The latter part of s. 9 of the Burial Act, 1855, has therefore been left as the only applicable legislation for the present purpose.

The facts of the present case are, except on one point, simple and undisputed. The district parish of Mytholmroyd was by Order in Council dated February 25, 1846, and made under the New Parishes Act, 1843, formed as a separate district for ecclesiastical purposes out of the ancient parish of Halifax, which was a parish of very great size, comprising some twenty-three townships forming one unit of administration for civil purposes, and also comprising as regards ecclesiastical purposes a large number of chapelries. It is clear from the provisions of the Act in question and the terms of the Order in Council that there was not at the time any actual church or chapel in the area constituted as the district parish of Mytholmroyd, but I understand that it is part of the common case of the parties that a church was soon afterwards built and consecrated as the parish church of the district

(1) 5 Ch. D. 944.

parish in question; that such church had attached to it a churchyard which became the churchyard of the district parish, and that from that time forward the position has been the same, so far as ecclesiastical purposes are concerned, as if the church and churchyard had been those of an ancient parish comprising the district marked out by the Order in Council.

In December, 1908, about a third of an acre of land adjoining the existing churchyard of the district parish was acquired by the vicar and churchwardens as and for an addition to and extension of the churchyard; and under the Consecration of Churchyards Act, 1867, this piece of land was duly conveyed for the purpose in January, 1910, and consecrated in February, 1910. The whole of this land is within a hundred yards of the plaintiff's houses. The plaintiff did in fact at one time consent to that portion of the extension which was nearest to his houses being used for burials, but that portion has now, as I understand, been filled, and the defendants are now allowing and claiming the right to allow burials in parts of the rest of the extension as to which the plaintiff has not given any such consent. It is not pleaded or seriously urged that, as to the remainder of the extension, the plaintiff's rights have been prejudiced by the consent previously given by him; and accordingly I have to determine a bare question of law, namely, whether the prohibitory words of s. 9 of the Burial Act, 1855, extend to and comprise extensions of churchyards such as this, which are made independently of the provisions of the Burial Acts in question.

For this purpose something may perhaps turn upon a question of fact, as to which there has been some controversy between the parties, namely, whether the district parish of Mytholmroyd is within the area comprised in the Order in Council of February 3, 1858, that is, whether it was a part of the parish of Halifax within the meaning of that Order. It is said on behalf of the defendants that, inasmuch as the unit for civil purposes was not the ancient parish but one or other of the twenty-three townships, and inasmuch also as the district parish had become completely severed from the parish of Halifax for ecclesiastical purposes, the district was in no sense within the parish of Halifax; and a distinction is taken between this district and certain other districts, mentioned in the Order in Council and its amending Orders as parts of the parish of Halifax, on the ground that those districts had only had chapels of ease built for them and had not been completely severed from the mother parish for ecclesiastical purposes. But on the whole I think that this argument is too refined, and does not really give any intelligible meaning to the phrase " parish of Halifax." It seems to me that the Order and its amending Orders are dealing with the whole of the area of the ancient parish of Halifax, and that it would be over-minute and really capricious to give to the language of what is obviously an Order relating to matters of sanitation a meaning which would make the application or non-application of the Order to depend upon whether any district had been wholly or only partially divorced from the ancient parish for ecclesiastical purposes. I have accordingly to deal with a case in which the place of burial in question is within an area in which an Order in Council has been made enacting that no new burial ground shall be opened without the previous approval of the Local Government Board, and I have to determine whether in such a case an owner of buildings within a hundred yards has (altogether apart from and independent of the giving or withholding of the official consent) a separate individual right to object to and prohibit the user of the ground for burials without his consent in writing.

On the mere construction of the Acts in question, and apart from authority, I have come to a clear and definite conclusion that no such separate or individual right is given except in the case of land appropriated or used as a burial ground or an addition to a burial ground under the Acts themselves. Sect. 25 of the Burial Act, 1852, s. 12 of the Burial Act, 1854, and s. 9 of the Burial Act, 1855, all contain express words limiting their operation to burial grounds either appropriated or used under the Acts in question. And further, in the original section in which the words occur, namely, s. 25 of the Burial Act, 1852, the words are preceded by the word " but," and are obviously by way of qualification of or limitation on the large powers of forming burial grounds which are given to burial boards formed under that Act. The Act in general was not an Act enabling burials, but an Act restraining burials, and the only part of the Act to which a prohibitory right of this kind would in any way be antagonistic is that part of the Act which gives powers for the formation of new burial grounds by new corporations under the Act in lieu of the burial grounds the construction and user whereof were prohibited by the Act. Further, in the case of cemeteries constructed by companies for profit, a similar restriction was already common and had been provided for by s. 10 of the Cemeteries Clauses Act, 1847. Accordingly I can see no reason why in the case of other burial places, and particularly in the case of churchyards or additions to churchyards, the Legislature should have given the owners of buildings a new and independent statutory right to restrain the opening of burial grounds which might be opened under the general law and did not offend against the common law as to nuisance. On the other hand, I can see very good reason why the Legislature, when constituting new corporations whose duty was to provide burial grounds, and giving them very wide general powers for the purpose both inside and outside their own parishes, should give the owners of buildings a clear and definite right to restrain their operations within due limits.

Unfortunately—and this is the only reason why I reserved judgment in the case—there is authority to the contrary of the above view in the decision of Malins V.-C. in *Greenwood* v. *Wadsworth*.(1) For, although that case dealt only with a burial ground provided by a particular religious sect and not with an addition to or extension of a churchyard, the decision was given on the ground that the prohibition in question is a general prohibition and is not limited to burial grounds appropriated or used under the Burial Acts. When, however, the report is carefully examined, it appears that the decision is a most unsatisfactory one, that in it mistakes have been made in stating the material sections of the Acts, including s. 25 of the Act of 1852, and that it is only in the last sentence of the judgment that any reference is made to the words limiting the prohibition to burial grounds under the Burial Acts. And further, the decision has been treated as wrong in the only or principal text-book on the subject, namely, Mr. Brooke Little's Law of Burials, and in the article on the subject in Halsbury's Laws of England. I think, therefore, that I should not be bound to follow the decision of Malins V.-C. even if I were dealing with the exceptional case of such a burial ground as was dealt with by the learned Vice-Chancellor, and that I am even more clearly free when the question is one with regard to the somewhat different and far more common case of an addition to a churchyard. The decision is not one of that class on which titles depend, or which, for that or other like reasons, have their authority strengthened by the lapse of time.

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(1) L. R. 16 Eq. 288.

It has indeed been urged by Mr. Romer that the decision in *Greenwood* v. *Wadsworth* (1) was approved or recognized by the Court of Appeal in *Lord Cowley* v. *Byas.* (2) I cannot take this view. The successful appellants in that case had plenty of other material for questioning the decision of Bacon V.-C. in the Court below, and indeed were stopped in the course of their argument. It was entirely unnecessary for the Court to question or indeed consider in any way the decision in *Greenwood* v. *Wadsworth* (1), which does not appear even to have been cited to them.

Accordingly I feel at liberty, and indeed bound, to deal with the matter upon the footing of my own interpretation of the legislation in question, and I give judgment for the defendants with costs.

Solicitors for plaintiff: *Robbins, Olivey & Lake, for Longbotham & Sons, Halifax.*

Solicitors for defendants: *Few & Co., for Dixons, Horne & Coles, Wakefield.*

(1) L. R. 16 Eq. 288. (2) 5 Ch. D. 944.

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Feb. 12, 13, 16, 17; March 6.

EARL OF DYSART *v.* HAMMERTON & CO.

[1909 D. 1038.]

Ferry—Franchise—Presumption of Lost Grant—Disturbance—Change of Circumstances—New Traffic—Landing Place—Highway—Pleasure Traffic—Declaration of Title—Rules of the Supreme Court, Order XXV., *r.* 5.

In an action for a declaration that the plaintiffs were entitled to an ancient ferry and an injunction to restrain the defendants from disturbing them in the enjoyment thereof:—

Held by Cozens-Hardy M.R. and Phillimore L.J. (dissentiente Buckley L.J.), that the plaintiffs were entitled to an ancient ferry and that a declaration to that effect ought to be made; that no new traffic had arisen which could justify the defendants in setting up another ferry near the plaintiffs'; that an injunction ought to be granted to restrain them from doing so; and that, in order to establish the existence of an ancient ferry from point to point sufficiently to enable the Court to presume a lost grant from the Crown of a franchise ferry, it is enough to shew that one of the points is on a public highway, and that the claimant could and did give to persons using the ferry leave to land at the other point and access therefrom to a highway.

Held, also, by the whole Court, that where such an action is dismissed on the ground that there has been no disturbance of the ferry, a declaration of the plaintiffs' title ought not to be made.

Decision of Warrington J. reversed.

Appeal from Warrington J.

The plaintiff the Earl of Dysart claimed to be the owner, and his co-plaintiff Champion claimed to be the lessee, of an ancient ferry known as Twickenham Ferry across the river Thames at Twickenham. The defendants had recently commenced to carry passengers across the river from and to certain points on the banks of the river between the plaintiffs' ferry and Richmond, and the plaintiffs asserted that this was a disturbance of their ferry, and brought this action against the defendants, claiming a declaration that they were entitled to the ancient ferry, an injunction to restrain the defendants from disturbing it, and damages. They alleged that they were possessed of an ancient ferry for the carriage of foot passengers and other goods across the Thames from and to Twickenham in the county of Middlesex to and from Ham and Petersham in the county of Surrey, taking for such carriage certain reasonable rights and ferriages. They claimed the ferry by prescription or lost grant as from vill to vill or as from point to point, namely, the points marked A and B on a plan which they produced.

For upwards of 300 years the predecessors of Lord Dysart had claimed, and during the period of which living witnesses could speak had actually performed all the obligations and duties of, a franchise ferry and had exercised the right to carry passengers and goods to and fro between A and B and to charge a toll for so doing. At the point A on the Middlesex bank of the river there were highways coming down to the river, which at this spot is tidal, so that the public had access to the ferry. At the point B on the opposite bank, the whole of the land belonged to Lord Dysart's predecessors and to him until 1902, when the towing path was by Act of Parliament made a public highway. From B passengers were able to cross Lord Dysart's land by a footpath, or along the towing path, to Ham Street, a public highway leading to the village of Ham. Petersham was the adjoining village on the east of Ham. A strip of land in Petersham and Ham adjoining the towing path had in 1902 been acquired by various public bodies and thrown open to the public as a recreation ground under the Richmond, Petersham, and Ham Open Spaces Act, 1902. At the same time the London County Council had acquired a considerable area of land in Twickenham called Marble Hill, on the north bank of the river opposite the new recreation ground, and converted it into a public park or pleasure ground.

The defendants with the licence of the London County Council under the London County Council (General Powers) Act, 1902, s. 15, set up a boathouse at the corner of Marble Hill Park where Orleans Road came down to the river, about 500 yards from the point A. For this purpose they obtained a licence from the Port of London Authority (the successors of the Thames Conservancy) to moor a floating boathouse in the tideway. At the boathouse they let out boats for hire and also ferried people across the river. The defendant Hammerton was a licensed waterman under the Watermen's and Lightermen's Act, 1859. Under s. 54 of that Act licensed watermen only may navigate a passenger boat for hire; s. 99 saves all rights in existing ferries,

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and therefore the owners of them need not be or employ licensed watermen; s. 28 provides that the Court of the Watermen's Company may appoint plying places and make by-laws. The by-laws prohibited plying for hire except at plying places. The defendants' boathouse had not been appointed a plying place. The plaintiff Champion, who rented and worked the ancient ferry, was not a licensed waterman, and the points A and B were not licensed plying places. The defendants had the word "ferry" painted in large letters on their boathouse and flew a flag with the words "Ferry to Marble Hill" on it. They also erected at the north end of Orleans Road where it joined the main road to Richmond, in Twickenham, about 600 yards from the river and their boathouse, a sign-board with the words "To Hammerton's Marble Hill Park boathouse and ferry" on it. There was evidence that persons coming from or going to Twickenham or Ham used their ferry, besides pleasure seekers who crossed the river in order to go to Marble Hill or the recreation grounds.

The documents bearing on the plaintiffs' title commenced with a lease of June 20, 1692, whereby the Duchess of Lauderdale (Lord Dysart's predecessor in title) demised to Richard Blower "free liberty and license for him the said Richard Blower to take into his boat and to land and sett on shore upon the lands of her the said Duchess in Ham in the county of Surrey att the usuall and accustomed place there foot passengers that shall pass from Ham aforesayd unto Twickenham and from Twickenham aforesayd to Ham aforesayd in such manner as he the said Richard Blower hath heretofore used and exercised the same liberty" for one year at a rent of 40*s*.

By a lease of November 28, 1704, Lyonell Earl of Dysart demised to Thomas Love "free liberty" &c. in the same language as that of the lease of 1692.

In the rentals of the estate from 1738 to 1765 the entries of rent paid stated that the payments were for "landing place at he ferry." After that date they were entered as for "the ferry."

On March 17, 1746, Margarett Langley in compromise of certain legal proceedings gave to Lord Dysart a bond for 100*l*. which recited that she had ferried passengers as "a publick ferry" notwithstanding "there is and has been time immemoriall about 100 yards distance" from her ferry "belonging to the said Earl a common ferry or landing place to carry passengers cross the said river of Thames"; and she agreed not to do anything "to the prejudice of the said antient ferry."

By a lease of March 26, 1746, Lionel Earl of Dysart demised to William Tomlins "ffree liberty and license to have and keep a fferry boat upon the river Thames between the town of Twickenham aforesaid and the Manor of Ham aforesaid for the passage of all ffoot passengers and for the carrying them to and fro for the usual and accustomed toll rate or price of one halfpenny each passenger" and liberty to land passengers on the Earl's ground "at the usual and accustomed place" in the same language as in the leases to Blower and others.

By an indenture of bargain and sale (a disentailing deed) of October 23, 1770, Lionel Earl of Dysart conveyed inter alia the manors of Petersham and Ham "and all that fferry over the river Thames from and to Ham aforesaid" and the general words included "franchises." In the consequent recovery was included "one passage over the river Thames."

Warrington J. held that the plaintiffs had established their title to a franchise ferry between A and B and granted a declaration to that effect; but that a new traffic, substantially different in character from that served by the ancient ferry, had sprung up, that the defendants' ferry was started bona fide to meet a genuine demand on the part of the public in connection with this new traffic, and that it would be an undue extension of the plaintiffs' monopoly if the Court were to prevent the defendants from continuing to carry persons across the river as they had been doing. He accordingly dismissed the action, but made a declaration that Lord Dysart was entitled to a franchise ferry between A and B.

The plaintiffs appealed and the defendants served notice of a cross-appeal.

P. O. Lawrence, K.C., and *C. Gurdon*, for the appellants. If the judgment appealed against be upheld it will be difficult for the owner of any ferry to maintain his rights wherever any development of property has occurred in the neighbourhood.

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The increase in the traffic across the river is not new traffic, but rather an extension of the original traffic. The origin of the doctrine as to new traffic is to be found in *Newton* v. *Cubitt.* (1)

[COZENS-HARDY M.R. There is a great difference in this respect between a vill to vill ferry and a point to point ferry.]

Yes. The owner of a point to point ferry is under an obligation to meet the demands of increased traffic, at the risk of revocation of his franchise. "If a ferry is erected on a river, so near another antient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects; otherwise he may be grievously amerced: it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen": Blackstone's Commentaries, vol. iii. p. 219. There has been no establishment here of any new highway, but a rival ferry has been started within 500 yards of the plaintiffs' ferry, there being no change in the character of the neighbourhood except the opening of the public park. We rely upon Lord Abinger's judgment in *Huzzey* v. *Field.* (2) There is nothing to take the present case out of that and to bring it within *Newton* v. *Cubitt.* (1) Warrington J. partly founded his judgment on *Hopkins* v. *Great Northern Ry. Co.* (3), but that was the case of a claim for compensation under the Lands and Railways Clauses Acts in respect of the disturbance of an ancient ferry by the building of a bridge in its vicinity.

[COZENS-HARDY M.R. referred to *Dibden* v. *Skirrow.* (4)]

There is no new traffic here within the meaning of the authorities. So to hold would destroy nearly every ferry across the Thames. *Cowes Urban Council* v. *Southampton, Isle of Wight and South of England Royal Mail Steam Packet Co.* (5) illustrates the kind of new traffic which will not be held to be a disturbance of an ancient ferry; but it is nothing like the present case. A mere increase or development of the locality is not sufficient to justify the disturbance of an ancient ferry: *General Estates Co.* v. *Beaver.* (6)

(1) (1862) 12 C. B. (N.S.) 32.
(2) (1835) 2 C. M. & R. 432.
(3) (1877) 2 Q. B. D. 224.
(4) [1908] 1 Ch. 41.
(5) [1905] 2 K. B. 287.
(6) [1913] 2 K. B. 433.

This is a stronger case than any of the authorities. There is an increase and an alteration in the character of the traffic, but it is not new traffic. There is no new highway as in *Newton* v. *Cubitt* (1) which necessitates a new ferry, and what the defendants are doing constitutes a disturbance of the plaintiffs' ancient ferry. [They also referred to *Gibson* v. *Clark*. (2)]

The plaintiffs and their predecessors have always performed the obligations attached to a franchise ferry, and on the documents of title there is sufficient to enable the Court to presume a lost grant.

Hon. M. Macnaghten, for the respondents. On the cross-appeal it is necessary to examine Lord Dysart's title. No doubt his predecessors in title have for 200 years exercised an exclusive right of ferrying between A and B; but no royal grant is produced, and the presumption of a lost grant is rebutted by the evidence. We admit that the plaintiffs' ferry is between the points A and B and not between the vills of Twickenham and Ham or Petersham. A franchise ferry is part of a public highway, and A and B must both be on public highways so that the public may have access to and from the ferry. A ferry is unconnected with the occupation of land and exists only in respect of persons using the right of way: *Newton* v. *Cubitt* (3); *Huzzey* v. *Field*. (4) In the present case the public had no right of way to or from the point B. Lord Dysart and his predecessors owned the land on the Surrey side and were able to grant leave to land and embark at B and allow passengers to cross their land between B and the high road to Ham, and the ferry probably grew up in that way without any suggestion of a franchise. All ancient ferries have their origin in royal grant or in prescription, which presumes a royal grant. A right of ferry is in derogation of common right, for by common right any person entitled to cross a river in a boat is entitled to carry passengers too. Within the limits of an ancient ferry no one is permitted to carry passengers across but the owner of the ferry: *Simpson* v. *Attorney-General*. (5) But the termini of the ferry must be on highways. Here Lord Dysart's documents shew that the point

(1) 12 C. B. (N.S.) 32.
(2) (1819) 1 Jac. & W. 159.
(3) 12 C. B. (N.S.) 58.
(4) 2 C. M. & R. 442.
(5) [1904] A. C. 476, 490.

B was not on a highway, for rent was charged for the right to land passengers there. This is a tidal part of the Thames, but the public had no right to walk along the towing path to the point B, which is spoken of as a landing place belonging to the estate. The ferry itself is not mentioned till 1765. The Court will not presume a lost grant of a franchise which is in derogation of common right, if the existence of the ferry can be explained in other ways. The Crown could not have granted a ferry of which one terminus was not accessible to the public; and no franchise was necessary, as Lord Dysart could have set up a ferry without it. There is no ground for saying that the defendants are doing anything illegal. Our barge is moored by licence of the London County Council, and we are authorized as watermen by the Port of London Authority to let boats for hire.

Even if this was a ferry not between the points A and B, but between the vills Twickenham and Ham as claimed in the pleadings, the circumstances have so changed that what we are doing is not a disturbance of the plaintiffs' ferry. A "vill" is always understood as being the same as a "town": *Huzzey* v. *Field.* (1) In those days Twickenham was open country with a few houses on it, and Richmond bridge had not been built. Marble Hill is in the parish of Twickenham, but the ferry would have been to the town of Twickenham only, not to the whole parish. Nobody who wanted to go from Ham to the vill of Twickenham would use the defendants' ferry. Even if the plaintiffs have a point to point ferry we have not taken their passengers. Many new highways have been made on both sides of the river; Marble Hill and the recreation ground on the opposite bank have been thrown open to the public, and a new ferry is wanted for their convenience: *Newton* v. *Cubitt.* (2) A new traffic of a completely different character has sprung up, consisting of people who are not passing between Ham and Twickenham, and a new ferry to meet their wants is not a disturbance: *Hopkins* v. *Great Northern Ry. Co.* (3); *General Estates Co.* v. *Beaver.* (4) A franchise for a monopoly of ferriage to and from the whole parish of Twickenham would be bad, and the

(1) 2 C. M. & R. 432, 442.

(2) 12 C. B. (N.S.) 32, 58.

(3) 2 Q. B. D. 224, 232.

(4) [1913] 2 K. B. 433.

Court will not presume that the Crown would make such a grant: *Cowes Urban Council* v. *Southampton, Isle of Wight and South of England Royal Mail Steam Packet Co.* (1) The declaration of the plaintiffs' title is of no consequence to the defendants if the Court holds that there has been no disturbance; but it ought not to have been made, for the action was dismissed.

P. O. Lawrence, K.C., in reply. If our ferry is destroyed there will be no ferry over this part of the river at work night and day. The defendants are under no obligation to work their ferry continuously. We are entitled to the declaration of title made by Warrington J. even though our action is dismissed: Rules of the Supreme Court, Order xxv., r. 5.

[BUCKLEY L.J. The question of a royal grant does not arise if there has been no disturbance, so how can the Court make a declaration of your title?]

The question did arise and was pleaded by the defence, and has been tried. The declaration is important to us with a view to possible future litigation. It might be sufficient for us to prove possession of the ferry: Saville, p. 11, pl. 29; *Peter* v. *Kendal.* (2) The old leases granted a right to land because Crown grants always referred to a particular landing place, and in a conveyance a lease of the landing place was equivalent to a lease of the ferry. The water and the landing place on the other side were public. Without a grant we should not have had an exclusive ferry nor a right to charge tolls. The fact that A and B are not plying places and our ferry has never been worked by licensed watermen under the Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii.), ss. 25, 28, shews that ours was an ancient ferry. This is not a vill to vill ferry, but a point to point ferry, and its position has never been shifted.

There have been many cases besides those which have been already cited in which the owners of ferries have been successful against disturbers of their ferries, e.g., *Churchman* v. *Tunstal* (3); *Attorney-General* v. *Richards* (4); *Tripp* v. *Frank* (5); *Trotter* v. *Harris.* (6)

(1) [1905] 2 K. B. 287, 296.
(2) (1827) 6 B. & C. 703, 710.
(3) (1659) Hardr. 162.
(4) (1795) 2 Anst. 603.
(5) (1792) 4 T. R. 666.
(6) (1828) 2 Y. & J. 285.

There is no new traffic in this case to justify the defendants in setting up a ferry; there is no new highway coming down to the river; no demand by the public for an additional ferry. It would only be used by pleasure seekers, and that would not justify interference with us, although possibly there is no distinction between passengers who reside in the neighbourhood and those who come from a distance.

Hon. M. Macnaghten referred to *Pim* v. *Curell.* (1)

March 6. COZENS-HARDY M.R. In this action the plaintiffs, claiming to be the owners of an ancient franchise ferry between Twickenham and Ham, complain of the disturbance of their ferry by the defendants, who have recently started a ferry from Twickenham to Petersham. Two questions arise for decision. In the first place, have the plaintiffs the franchise right they claim, and in the second place, is the ferry started by the defendants justified and prevented from being a disturbance by reason of the existence of a "new traffic"?

It has been proved that boats have been used beyond living memory, and probably for at least 200 years, to convey passengers on payment of 1*d.* or ½*d.* to and from an "accustomed place" on the plaintiff's land on the Surrey shore from and to a place on the Middlesex side, to which certain highways led. The "accustomed place" on the Surrey shore is marked B on the plan. From that point access could be obtained to Ham Street, an ancient highway, either by a footpath across the plaintiffs' land and shewn on the map, or by passing along the towing path, the soil of which is vested in the plaintiffs. In my view it is not essential to shew that either the footpath or the towing path is an ancient highway, although if necessary the long-continued usage by the public would justify such a finding. It is sufficient to shew that the plaintiffs could give and did give to persons using the ferry access from B to a public highway, namely, Ham Street. If this were all, I think it would follow that the Court would presume a lost grant from the Crown of a ferry. Such a grant involves an exclusion of the general public—it is, in short, a monopoly, justified on the theory that it is to the interest of the public that there should be provision for crossing the river, which provision could not be secured unless a monopoly were established. The owner of an ancient ferry is bound to maintain at all times a suitable boat, and is liable to indictment if he fails so to do. The difficulty I have felt is that there is no trace in the early deeds and documents produced by the plaintiffs of any such right, and there is a good deal inconsistent with such right. The earliest document is a lease of June 20, 1692; it does not purport to be a lease of a ferry; it is only a demise to Blower, waterman, of free liberty and licence to "take into his boat and to land and sett on shore upon the lands of her the said Duchess in Ham in the county of Surrey att the usuall and accustomed place there foot passengers that shall pass from Ham aforesayd unto Twickenham and from Twickenham aforesayd to Ham aforesayd in such manner as he the said Richard Blower hath heretofore used and exercised the same liberty." The yearly rent was 40*s.* That seems to me much more like a permission to the waterman to land on the estate of the Earl of Dysart's predecessor, which without such licence would have been a trespass, than a grant by the owner of a franchise ferry of that ferry. The estate rentals in 1738 speak of "rent for landing place at the ferry," and these entries continue up to 1765, although after that year the estate rentals speak of "rent for ferry." In 1746 there was a lease which for the first time mentions the word "ferry"—it was a licence "to have and keep a ferry boat upon the river Thames between the town of Twickenham aforesaid and the Manor of Ham aforesaid for the passage of all foot passengers and for the carrying them to and fro for the usual and accustomed toll rate or price of one halfpenny each passenger"—and also words identical with those in the lease of 1692. This again rather suggests a de facto ferry in respect of which not only tolls but rates or prices were by custom charged to persons using the ferry. On the other side, there is evidence that there was some litigation about the ferry from 1743 to 1746 which assumed, if it did not establish, the existence of a ferry which was disturbed. Upon the whole, though not without doubt, I think a lost Crown grant may be presumed.

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(1) (1840) 6 M. & W. 234, 239.

What then was the right granted? Was it a vill to vill ferry from any point in Twickenham to any point in Ham, or was it a point to point ferry? I think the uninterrupted usage must be looked to, and that the proper conclusion is that it was a point to point ferry, from the points A to B on the map which has been put in evidence.

Assuming the point to point ferry from A to B, I think it may be disturbed by a ferry from another point in Twickenham to a point in Petersham close to the borders of Ham. Whether it is such a disturbance will depend upon the distances and other circumstances. In the present case, the new ferry is a little more than 500 yards from the old ferry, and the evidence satisfies me that the new ferry diverts traffic which would otherwise have come to the ancient ferry. I think the distance is not so great as to deprive the plaintiff of his rights unless there has been some change of circumstances, or some new traffic. For instance, the extension of the town of Twickenham towards Richmond, without any change in the nature of the traffic, would not be important. The plaintiff would be entitled to say, "Here is my ancient ferry; I am ready and willing to ferry across all comers. It is of no moment that a new ferry would be a great convenience to you."

It has, however, been held, and, as it seems to me, with great good sense by Warrington J., following the views expressed by Willes J. in *Newton* v. *Cubitt* (1): "The monopoly is created for the convenience of the public and it would, I think, be unreasonable to so extend it as to cause it to be a substantial inconvenience to the public rather than a convenience. Consistently with this view, the Courts have determined that the owner of the franchise has no exclusive right to carry traffic which is substantially a new traffic or traffic which naturally, and for reasons of public convenience, crosses the river between points not being those which are the termini of the ancient ferry."

The difficult question in this case is whether there is a new traffic such as justifies the defendants' new ferry. The facts may be shortly stated. A few years ago it was thought desirable to preserve the view from Richmond Hill, and Parliament empowered various public bodies to spend money for this purpose. The London County Council purchased Marble Hill Park on the Middlesex side, which runs down to the path on the river bank from Twickenham to Richmond. The towing path on the Surrey side, which was owned by Lord Dysart, and along which there may or may not previously have been a public footpath, was made a place for public recreation on which the public might loiter and amuse themselves. People coming on Saturdays and Sundays, or on Bank Holidays, to Richmond Hill, seeing the Marble Hill Park, think it is a nice-looking place, and come down to the river through Petersham and desire to be ferried across. There are also people who walk on the Surrey side from Richmond Bridge by the river path, and desire to return by the path on the Middlesex side. For all such persons the defendants' ferry, which lands them at the end of Orleans Road at the corner of Marble Hill Park, is far more convenient than the ancient ferry. I am not satisfied that this is in any sense such a new traffic as the authorities refer to. The ancient ferry has always been used to a large extent for purposes of pleasure—in short, by the same class of persons as now use the defendants' ferry. The mere fact that it would be convenient to persons living 500 yards away from the ancient ferry is not in itself sufficient. The learned judge who tried the case held that there was a new traffic different in character. With great respect, I am unable to concur in this view, and I think the plaintiffs are entitled to relief. It is not the practice of the Court, when a wrong has been established, to suggest how or under what circumstances, if at all, the defendant may so far modify his arrangements as not to infringe the injunction, and therefore I express no opinion on that point.

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(1) 12 C. B. (N.S.) 58.

If, however, Warrington J.'s view was correct, I think his judgment, in so far as it contained a declaration that the plaintiffs were entitled to a franchise ferry from A to B, ought not to stand. He granted the declaration only as an indulgence. If, however, the plaintiffs are held not entitled to any relief against Hammerton, it is really unimportant whether the plaintiffs have or have not an ancient ferry which the defendants have not disturbed.

The rule enabling the Court to make a declaratory decree ought not to be applied where a declaration is merely asked as a foundation for substantive relief which fails. The dismissal of the action is not a decision adverse to the plaintiffs' title to a franchise ferry.

The order of this Court will be to discharge the order of Warrington J. except so far as the declaration of the plaintiffs' title is concerned. And there must be an injunction restraining the defendants from disturbing the plaintiffs in the enjoyment of their ancient ferry. The defendants must pay the costs here and below.

BUCKLEY L.J. "A public ferry, then, is a public highway, of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills": *Huzzey* v. *Field*. (1) There cannot be a public ferry, therefore, one of whose termini is a place to which the public have not a right of access. This is a very material circumstance upon the question dealt with in the latter part of this judgment.

"A ferry exists in respect of persons using a right of way, where the line of way is across water. There must be a line of way on land, coming to a landing place on the water's edge . . . . or, where the ferry is from or to a vill, from or to one or more landing places in the vill. . . . . The ferry is unconnected with the occupation of land, and exists only in respect of persons using the right of way. The questions, whence they come, and whither they go, are irrelevant to the exercise of that right: and the ferryman has no inchoate right in respect of any of them, unless they come to his passage": *Newton* v. *Cubitt*. (2) If the ferry be a vill to vill ferry it is a disturbance to carry passengers at a little distance above or below the ferry. But if the persons are substantially and not colourably carried over to a different place this is no disturbance. The ferryman of a vill to vill ferry cannot be compelled to carry passengers except from vill to vill and his right is commensurate with his duty: *Tripp* v. *Frank*. (3)

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(1) 2 C. M. & R. 432, 442.

(2) 12 C. B. (N.S.) 32, 58.

(3) 4 T. R. 666, 668.

"If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable": *Newton* v. *Cubitt.* (1) "A change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway": *Newton* v. *Cubitt.* (2) If the persons are substantially and not colourably carried to a different place it is unreasonable to require that they must be carried out of their way on account of the plaintiff's ferry: *Tripp* v. *Frank* (3); *Newton* v. *Cubitt.* (4) If the passenger has a particular view of convenience in making a place other than the terminus of the plaintiff's ferry the place of his landing, which could not have been accomplished as well by a landing at the plaintiff's landing, there is no evasion of the plaintiff's ferry: *Huzzey* v. *Field* (5), referring to *Tripp* v. *Frank.* (6)

These are upon the authorities the principles which I have to apply, and with this preface I turn to the facts of the present case.

The judgment under appeal is very singular in point of form. It contains a declaration in favour of the plaintiffs' right and then dismisses the action with costs. The respondents have delivered a notice of cross-appeal relating to the declaration. They were driven to do this, as it seems to me, for if upon the appeal this Court should differ from the learned judge as to the rest of the case, then the respondents contend that the declaration is wrong. But if upon the facts the action fails whether the declaration is right or wrong, then the respondents are indifferent as to the view which the Court may take upon the subject of the declaration.

For the purpose of the earlier part of this judgment I shall leave it an open question whether the plaintiffs are or are not entitled by virtue of a lost grant to a franchise ferry whether from point to point or from vill to vill. For the moment I will assume as against the defendants that the plaintiffs are so entitled. If upon that assumption the defendants are right, then it would be

(1) 12 C. B. (N.S.) 60.
(2) 12 C. B. (N.S.) 59.
(3) 4 T. R. 668.
(4) 12 C. B. (N.S.) 61.
(5) 2 C. M. & R. 444.
(6) 4 T. R. 666.

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unnecessary to determine the question which I am for the moment leaving open.

It is essential I think to discriminate between, (first,) traffic—including increased traffic due to altered circumstances—which having regard to the approaches to the river theretofore existing would naturally go to the plaintiffs' ferry, and, (secondly,) traffic which for want of better accommodation must go to the plaintiffs' ferry because there is not such a new communication as, (if that be the case,) public convenience properly demands. The ferry owner is entitled to the former, that is the traffic which would go, but not to the latter, that is traffic which must go for want of better accommodation, to his ferry. It must not be forgotten that the owner of a ferry has not a monopoly to carry persons across the river even at the point where his ferry is established. His monopoly is a monopoly to carry passengers by boat. After difference of opinion it was established in *Hopkins* v. *Great Northern Ry. Co.* (1) that it is not disturbance of a ferry to erect a bridge. In that case *Reg.* v. *Cambrian Ry. Co.* (2) was overruled and Blackburn J.'s dictum (3) was disapproved. See also *Dibden* v. *Skirrow.* (4) If a passenger can cross otherwise than by the ferry he may do so (say by a bridge), but if he wants to cross by boat he must not cross by boat so as to disturb the ferry. This consideration as to a bridge does not of course at all determine the question where the contest is between ferry and ferry, but it is a consideration to be borne in mind as indicating that a ferryman has no claim upon the purse of every one who wants to cross the river or (as is said in *Newton* v. *Cubitt* (5)) has no inchoate right to a passenger unless he comes to his ferry.

Has there been such a change of circumstance and such a new condition created by the acquisition for the public of the Marble Hill Estate on the Middlesex side and the long strip of ground adjoining the river on the Surrey side as that it is true to say that for the accommodation of persons desiring to cross (say) from or to Marble Hill to enjoy as they are entitled to do recreation

(1) 2 Q. B. D. 224.
(2) (1871) L. R. 6 Q. B. 422.
(3) L. R. 6 Q. B. 430.
(4) [1908] 1 Ch. 41.
(5) 12 C. B. (N.S.) 32.

in the public ground on each side of the river the public convenience requires a new passage? Is a new passage other than the plaintiffs' ferry situate where the defendants' passage is a public convenience required by new circumstances so that persons shall not incur trouble and waste of time in going 500 yards up the river and 500 yards down again in order to achieve the passage which they desire? This is the type of question suggested and I think rightly suggested by Kennedy J. in *Cowes Urban Council* v. *Southampton, Isle of Wight and South of England Royal Mail Steam Packet Co.* (1) The learned judge, Warrington J., answered this question in the affirmative and I agree with him. The plaintiffs not unreasonably lay stress upon the board which has been put up at the junction of the Richmond Road and the Orleans Road with the words "To Hammerton's Marble Hill Park boathouse and ferry." If I am right in the view I have already expressed it seems to me that that board does not alter the case. Its purpose is not to divert persons from going to the plaintiffs' ferry if that is the direction they wish to take, but to inform them that if the Marble Hill Park is their destination they will find as part of or adjacent to that public park a boathouse where a boat can be obtained and a ferry at which they can cross the river. If the defendants are entitled to ferry persons over to and from the steps to which their ferry leads they cannot discriminate and we cannot order them to discriminate between one person and another who presents himself and desires to cross.

We have heard a good deal of discussion as to whether there has existed for many years past a public right of footway along the Surrey shore from Richmond to Eel Pie Island and onwards. It is part of the plaintiffs' case to establish this, for their case involves that there is in the public a right of public access to the ferry on the Surrey side. In my opinion the evidence is not sufficient to establish it. But even if the public have had such a right of way their right is by the recent acquisition of the land on the Surrey side at any rate enlarged in that they have now not a mere right of passage but a right of recreation and enjoyment. They may loiter and play games and do other acts which they could not do upon a highway. The enjoyment therefore of the land on the Surrey side has unquestionably been altered, and that alteration has produced a new state of things to which effect must I think be given in this action. Upon this ground I think that the judgment under appeal is right. I think it necessary, however, to add that in this state of things the learned judge, being of opinion as I think rightly that the action ought to be dismissed, ought not to have made the declaration which he made.

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(1) [1905] 2 K. B. 287, 299.

Under Order xxv., r. 5, the Court now has power to make declarations of right whether any consequential relief is or could be claimed or not. The purpose of these last words is not I think to enable a declaration to be made in a litigation between parties in which the plaintiff could under no circumstances obtain relief against the defendant. It is addressed to cases in which no substantive relief can at present be given, not to cases in which substantive relief could never be given. A declaration can under proper circumstances be made so as to bind future rights. The case here is one in which the learned judge has found that the plaintiffs could have no relief against the defendants at all. In such a case the Court ought not and I think cannot make a binding declaration of right in favour of the plaintiffs. For these reasons, while I agree with the learned judge that the action should be dismissed, I think that upon this ground without more the declaration ought to be discharged.

At this point I might conclude this judgment, for being of the above opinion upon the facts it is for the purposes of my own judgment not material to consider whether the plaintiffs have or have not made out their title to the franchise of a ferry. But inasmuch as the other members of the Court upon their view of the facts have of necessity decided this question, the defendants are entitled to have my opinion upon it.

Upon the documentary evidence there has existed from a date earlier than the year 1692 a ferry for foot passengers from Ham to Twickenham and from Twickenham to Ham. The plaintiffs' case is that the Court ought to presume a lost grant under which their predecessors in title became entitled to the franchise of a ferry between what I have no doubt are the proper points, namely, those marked A and B upon the map. To point A there were and are highways coming down to the river. At the point B the soil belonged to the plaintiffs' predecessors in title, and the documentary evidence goes to shew that in 1692 there was no public right of access to that point. There is of course no difficulty upon the ground of ownership in the plaintiffs' predecessors in title of the land at B in presuming a lost grant in favour of such predecessors from the point A (to which there was a highway) to the point B at which the plaintiffs' predecessors were owners of the land and could dedicate a highway. But if such a public ferry was thus established, and was existing in 1692, it necessarily follows that the plaintiffs' predecessors must before that date have dedicated to the public a right of access to and passage from the point marked B. The soil must as from at latest the date of the lost grant have become subjected to rights in the public. The documents negative such a dedication. The earliest document we have is a lease of June 20, 1692. This is not expressed to be a lease of an existing ferry, but is a deed by which the plaintiffs' predecessor in title demised to one Blower in consideration of a rent liberty and licence for Blower to take into his boat and to land and set on shore upon the lands of the grantor in the county of Surrey at the usual and accustomed place there foot passengers that shall pass from Ham to Twickenham and from Twickenham to Ham. This is inconsistent with the existence of a public right then existing by virtue of which Blower, if he became entitled to the ferry, would as of course be entitled to land his passengers at the place to which the public had right of access. This is the strongest observation upon this lease. But there is the further observation that the demise does not purport to be of an ancient ferry or a common ferry, but of a right to land passengers upon that which is treated as being the private land of the grantor, and upon the terms that the grantee of such licence shall pay a certain rent to the owner of the soil. The same observations are true of the next lease, that of November 28, 1704. Further, in the estate rentals from 1738 to 1765 inclusive the rents are entered as due in respect of "landing place at the ferry" or "landing place." There is no trace of any rent for the ferry as a ferry. From 1765 onwards the language in the rental book is altered and the rent is entered as paid for "the ferry," but having regard to the previous entries this does not seem to me to carry much weight. In 1744 Lord Dysart recovered against certain persons named Trehern and Langley damages for trespass. On March 5, 1746, a bond was given by Margaret Langley, widow, and Samuel Kain, to Lord Dysart, which contains recitals which seem to negative any public right of foot passage along the Surrey shore, and recitals as to a "publick ferry" which Langley and Kain have worked across the river to the Surrey bank to the detriment of Lord Dysart by trespassing on Lord Dysart's land notwithstanding there "has been from time immemorial a common ferry or landing place to carry passengers" across the river which has been leased by Lord Dysart and his ancestors from time to time to divers persons. It then recites certain litigation by Lord Dysart and by Tomlin, his tenant of the ferry, against Langley and Kain, and the bond is given to secure that Langley and Kain shall not work boats to ferry over persons on the Earl's ground nor keep any public ferry whereby the Earl or the tenants of the ancient ferry should be injured. This is wholly consistent with a ferry established by Lord Dysart's predecessors in title and not being a franchise ferry. The expression "publick ferry" is used to express the new ferry which the trespassers have established, and the "ancient ferry" means no more than the old-established ferry whatever in its nature it be. The next lease, namely, that of March 26, 1746, does, it is true, purport to demise the licence to have a ferry boat (a demise which was not contained in the previous leases), but it then goes on to demise as before a licence to the tenant to take into his boat and land passengers on the lands of the grantor on the Surrey side in such manner as Blower and his widow had theretofore used and exercised the same liberty. The significance of the demise of a ferry is in this deed discounted by the fact that as before there is a demise of the right to land on the Surrey side, and apart from this there is no reason to conclude that the ferry demised was other than a ferry established by Lord Dysart's predecessors in title as before stated. It seems to me that the ferry here spoken of cannot be a franchise ferry, but must be a ferry established by Lord Dysart's predecessors in title in connection with which they demised the right to use Lord Dysart's land as the landing place on the Surrey side. This right of user is by this lease expressly demised to the tenant of the ferry rights. Having regard to the previous documents it does not seem to me that from this bond the conclusion is to be reached that the "ancient ferry" there mentioned is a franchise ferry or any other than a ferry long since established by Lord Dysart's predecessors in title from the highway on the Middlesex shore to a certain place on the Surrey shore to which they were willing to give passengers access for the purpose of crossing the ferry. It is further most material to notice that if Twickenham ferry was a franchise ferry it must be that there has existed in the public during the existence of the ferry a right of access by some highway on the Surrey shore to reach the point B. The existence of such a highway is not proved, but the contrary is indicated. Lord Dysart and his predecessors in title have no doubt acquiesced in the user by persons crossing Twickenham ferry of the tow-path and perhaps of some other paths leading to the point B. But this may well have been by licence by implication given to such persons as were by Lord Dysart's tenant of the ferry and landing place carried to the place B, which the tenant was by lease authorized to use for the purpose of landing them. The doctrine of presuming a lost grant rests upon the principle that for a right capable of a legal origin, which has been long enjoyed and is otherwise unexplained, the Court will presume that a legal origin exists. The whole subject was recently reviewed in the case of *Attorney-General* v. *Horner* (No. 2). (1)

Upon the facts which I have stated I do not find that the right long enjoyed is unexplained. It is capable of being explained, and is explained by the documents if the fact be that Lord Dysart's predecessors in title long ago of their own mere motion established the Twickenham ferry and authorized the user by such persons as should cross the ferry of the landing place on the Surrey side and the paths by which it was approached. If this be the nature of the ferry there has not been created any

(1) [1913] 2 Ch. 140.

monopoly. I have upon the documents arrived at the conclusion that this is so. I hold therefore that the plaintiffs have not established their right to the franchise of a ferry from A to B.

Upon both grounds, therefore, I think that the declaration in the judgment ought to be struck out and the plaintiffs' appeal dismissed.

PHILLIMORE L.J. I agree with Warrington J. that the plaintiffs have made out a title to an ancient ferry from the point A in the parish or town of Twickenham to the point B in the manor of Ham. The lease in 1746 and the subsequent leases and the receipt of rent under them, coupled with the evidence of user, the legal proceedings taken in assertion of the right, the submission to the burden which follows on the right, ferrying at all hours and upon the same terms, all this being uncontradicted and unanswered is enough. To this I would add that this piece of the river Thames being between New Windsor and Yantlet Creek was within the area in which the Company of Watermen and Lightermen have the privileges conferred by 7 & 8 Geo. 4, c. lxxv., and the later Act of 1859, 22 & 23 Vict. c. cxxxiii., referred to in *Letton* v. *Goodden* (1), and since the earlier Act was passed, if not before, it would be unlawful for the ferryman unless it were an ancient ferry to ply for hire not being a licensed waterman, or to ply between places not marked as plying places: see the case of *Matthews* v. *Peache*. (2) We have nothing to shew that it was ever required of the ferryman to be a licensed waterman, and we are told that the present ferryman has been there forty years and is not one, and the points A and B are not licensed plying places.

The descriptions in the leases of the two termini of the ferry are general; but user shews that they were the points A and B.

With regard to the earlier leases of 1692 and 1704 the demise is not full or precise; but I think it may be adequate. At any rate it is not inconsistent with this being an ancient ferry. The landing place is spoken of as an usual and accustomed place. As

(1) (1866) L. R. 2 Eq. 123.

(2) (1855) 5 E. & B. 546.

is shewn by the case of *Peter* v. *Kendal* (1), the ferry owner must, if there be not a public highway right up to the boat, at least have possession of the land intervening between the nearest highway and the boat in order to be in a position to exercise his franchise.

If we were to hold that licence given by the ferry owner to pass over his lands was not enough, and that to make it a public ferry there must be an absolute right of way for the public up to the river bank, so that the ferry is itself a floating bridge in a continuous highway, the right of the public to pass still would not give a boatman of necessity the power to take the public on board or to use a landing stage, a necessity in a tidal river with soft banks, or even to moor his boat to the bank. These are rights which the owner of the ferry franchise must demise inter alia to the boatman, and the demise of them will give the boatman all that he needs to put him in possession of the ferry, and may be a sufficient expression of the grantor's intention. As it is said in Saville, p. 11, pl. 29, the ferry is in the owner in right of the land on the bank and not in right of the water. The subsequent leases are fuller and more careful; but they do not necessarily lead me to suppose that the parcels are different.

Next as to the alleged disturbance. After reading the evidence of the witnesses for the plaintiffs I think there is no doubt that the defendants' ferry does diminish the number of passengers who would come to the plaintiffs' ferry. The defendants' ferry carries two sets of passengers, one which proceeds to or from Marble Hill and the other which proceeds from or goes to the terminus of Orleans Road. With the first class I will deal later. The second class consists of persons who, if the defendants' ferry were not there, would either not come across the river at all or would use the plaintiffs' ferry; and after making some deduction for persons who would not cross at all, I am certain that there are many who would cross and who would use the plaintiffs' ferry. Can the use by these people of the defendants' ferry be ascribed to new traffic?

On the Middlesex side there are no new roads except a small one close to the plaintiffs' ferry. On the Surrey side there are no new roads unless the conversion of the tow-path and the strip of land adjoining it from River Lane onwards into an open space be taken as making a new road.

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(1) 6 B. & C. 703.

The rights of user of the tow-path along the Thames vary according to my knowledge considerably. There are portions of the tow-path over which the public have acquired the right of passing and repassing on foot as on any other public highway for foot passengers, portions which may even be bridleways, and there are other portions over which there is no dedication to the public, but only a demise to the conservancy authority so that they may be used for towing vessels.

I take it in favour of the defendants that the documents shew that over this portion of the tow-path there was no public footway till the tow-path and strip adjoining were made an open space by Act of Parliament in 1902. But though the public had no access as of right to the tow-path, I do not doubt that before the making of the open space, and by licence of the owner of the lands of Ham House, who, it may be remembered, might as owner of the ferry be willing to attract passengers, people in fact walked in large numbers along the tow-path and arrived at the ferry in that way as well as by the footpath from Ham Street to the point B. Be this as it may, I do not think that the Act of 1902 and its consequences can be taken as making the tow-path into a new coast road, or that if it did, any spot in the coast road can be taken as the debouching of a new highway on to the river, or as bringing this case within the language of Willes J. in the Isle of Dogs case (1)—I am quoting from p. 59 of the report—where he says that "a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway." Nor do I think that the actual decision in *Newton* v. *Cubitt* (1) is adverse to the plaintiffs. There a series of highways converged upon Cubitt's Pier, a spot 1280 yards distant from Potter's Ferry Stairs, the claimant's point on the Middlesex side, and considerably further than Cubitt's dock from which the claimant had been already held in *Matthews* v. *Peache* (2), already cited, to have no right of ferriage. This debouching of one or more highways upon the river at a new spot was none the less important because the highways were in fact streets and there was a populous town behind Cubitt's Pier. The King's subjects thereupon became entitled to continue the line of these highways across the water and were not thereby in the language of the law disturbing the claimant's ferry.

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(1) *Newton* v. *Cubitt*, 12 C. B. (N.S.) 32; affirmed in Exchequer Chamber, 13 C. B. (N.S.) 864.

(2) 5 E. & B. 546.

In *Cowes Urban Council* v. *Southampton, Isle of Wight and South of England Royal Mail Steam Packet Co.* (1), which if it goes further than the Isle of Dogs case is open to review by us, the only point left for decision after the plaintiffs had abandoned a part of their case was as to a traffic across the river Medina at points distant 875 yards on one bank and 230 yards on the other from the points of the ancient ferry, the new ferry plying between, as I understand the facts, new streets,—that is highways having a mass of houses on them and behind them and on one side a railway terminus, and debouching on both sides on to the river. That case is not this case. Neither, I think, is *Hopkins* v. *Great Northern Ry. Co.*(2) helpful to the defendants. That case overruled *Reg.* v. *Cambrian Ry. Co.* (3) The Court there for argument's sake assumed, an assumption now declared not to be law (*Dibden* v. *Skirrow* (4)), that a bridge might be a disturbance of a ferry. On this assumption it first decided that a railway bridge carrying traffic across the river from and to places far distant was not a disturbance. Next it had to deal with a foot-bridge constructed to bring passengers to and from a station on one side of the river and so far used as auxiliary to the railway traffic, and this user the Court held upon similar principles was not a disturbance.

There arose a third but not very important class of possible disturbance, an user of the foot-bridge by persons not intending to go to the station or coming from it, but merely to get across the river. As to this class of traffic the decision is in substance that the railway company did not invite it, and could not well stop it. They were not bound to keep a man to inquire of passengers what their object or destination was or to stop them if the object or destination were illegal. The case, however, of *Huzzey* v.

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(1) [1905] 2 K. B. 287.
(2) 2 Q. B. D. 224.
(3) L. R. 6 Q. B. 422.
(4) [1908] 1 Ch. 41.

Field (1) shews that if the ferryman at the new ferry does know that his passenger is one who ought to go by the ancient ferry he will be liable for carrying that passenger.

Laying aside still for the moment the ferriage of passengers from the open space on the Surrey side to Marble Hill and vice versa, which I have called the first class of alleged disturbance, I am of opinion that all other ferriage of passengers by the defendants is a disturbance of the plaintiffs' rights.

As to the ferriage of the first class I have been in considerable doubt. There is no case at all like it. Ferries in their inception were for people on business and not on pleasure bound. The pleasure seeker, the exercise taker, was an exceptional case. It is possible to regard the river in this respect rather as if it was an artificial piece of water (like the Serpentine) bisecting a pleasure ground.

If the defendants had proved the last sentence in paragraph 3 of their defence, that is that they had ferried persons resorting to the park and not otherwise, or rather if it had not been proved against them that they had done more, I should have been in doubt whether any injunction ought to be granted.

As it happens they have not only done more but they have solicited a more extensive traffic. They have put up a sign at the junction of the Richmond Road and Orleans Lane, inviting passengers to their ferry, and they have on their barge an unqualified announcement of ferry, not limited to passengers to and from Marble Hill. By so doing they have in my judgment disturbed the plaintiffs in the enjoyment of their rights, and I think that the plaintiffs are entitled to the declaration which they seek and to an injunction against the defendants in the terms precisely stated by the Master of the Rolls in his judgment.

I should add that if I were of opinion that there had been no disturbance, I should not have approved of a simple declaration of right which could not be followed by consequential relief, and in this matter I agree with the judgments of the other members of the Court.

Solicitors: *Horne & Birkett; Withers, Bensons, Birkett & Davies.*

H. C. R.

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(1) 2 C. M. & R. 432.

In re SCOTT.

SCOTT *v.* SCOTT.

[1912 S. 523.]

WARRINGTON J.

1914

Feb. 24, 25.

Will—Specific Gift of Foreign Property free of Legacy Duty—" Legacy Duty" —French Mutation Duty—Whether payable by Specific Legatee or Executors.

Testator, a domiciled Englishman, by his will bequeathed to Lady S. "free of legacy duty" all his pictures, engravings, furniture, busts, silver plate, and "works of art" of every description wheresoever situate, except at his two London houses or except those bequeathed specifically by his will. At his death he was possessed of a number of valuable tapestries which were attached to the walls of his house in Paris, which the Court held, upon the facts, passed to Lady S. under the specific bequest of "works of art." According to French law mutation duty was payable by the legatee on these chattels:—

Held, on the construction of the will, that the expression "legacy duty" was used by the testator in its strict legal sense as meaning the duty imposed by the Legacy Duty Act, 1796, and amending Acts, and not as meaning all duties in the nature of legacy duty, and that it did not therefore include the French mutation duty.

Held, also, that, the mutation duty being a debt due by the legatee, the legatee in order to succeed must shew that the will imposed on the executors an obligation of paying a debt of the legatee, and this she had not done.

Held, therefore, that the mutation duty was payable by the legatee.

Peter v. *Stirling* (1878) 10 Ch. D. 279 distinguished.

ADJOURNED SUMMONS.

Sir John Edward Arthur Murray Scott, Bart., by his will, dated October 26, 1900, after appointing executors and trustees thereof, made (inter alia) the following bequest:—"I also bequeath to the said Victoria Sackville-West"—now Lady Sackville—"for her sole and separate use and free of legacy duty all my pictures engravings furniture busts silver plate and works of art of every description wheresoever situate except at 5 Connaught Place and 8 Chandos Street London or wherever may be situate my London house or except those bequeathed specifically by this my will, and a further sum of 150,000*l.* all bequests to be free of legacy duty." The testator devised and bequeathed his residuary real and personal estate upon certain trusts for his brothers and sisters and their issue.

The testator died on January 17, 1912, domiciled in England. At his death he was possessed of a number of valuable tapestries which were attached to the walls of his house in Rue Lafitte, Paris.

After his death his will was contested by the residuary legatees and considerable litigation took place with reference to it in the Probate Court.

This was a summons taken out by some of the residuary legatees, one of whom was also an executor of the will, for the determination (inter alia) of the questions (1.) whether these tapestries passed to Lady Sackville under the above bequest as "works of art," and (2.) if they did, who was liable to pay the French mutation duty in respect of them.

The summons was heard by Warrington J. for Neville J.

The question as to the devolution of the tapestries was first argued.

Warrington J. held, upon the facts, that the tapestries were works of art and not part of the house, and that not being within the excepted places they passed under the specific bequest to Lady Sackville.

The question as to the payment of the French mutation duty was then argued.

With regard to this duty affidavits by two French advocates, M. Gabriel Astoul and M. Henri Mesnil, were filed on behalf of the specific legatee. M. Astoul deposed as follows:

Par. 4. "There is only one death duty in France namely: 'droits de mutation par décès' which is a duty payable on transmission of property on death."

Par. 5. "This French duty is one which has been payable in France for more than 100 years (having been created in 1798 by a law known as the Law of the 22nd Frimaire year 7), but the rates at which it is payable have from time to time been altered by what I may call Finance Laws which correspond with English Acts of Parliament dealing with similar matters and the last of which containing such an amendment was made in the year 1910. The duties are payable on different scales as mentioned in paragraph 5" of the affidavit of the plaintiff to which he referred.

Par. 6. "In France all estates as far as property locally situate there is concerned are liable to the duty irrespective of the nationality or domicile of the deceased, but the domicile of the deceased is an important factor for the purpose of determining what property other than that so locally situate may be liable to duty."

Par. 7. "In France executors are ignored and the beneficiary is the person liable for the duty and to whom the authorities look for payment thereof. In the case of an English testator however the practice is, having regard to the particular status of executors according to English law, to allow the executors to make the required declaration and pay the duty, but notwithstanding this they are not considered liable and consequently no step could be taken against them to enforce payment if they did not offer to make it."

Par. 8. "The French authorities are entitled to pursue (in personam) the person responsible for the duty and after obtaining a judgment to levy execution out of the specific legacy and out of any other property of the person so responsible. They have also power to issue a sort of writ called 'contrainte' upon which execution can be levied as upon a judgment, but in such a case the party liable has a right to appeal to the Court. They are further entitled in aid of their rights under such a judgment or writ to a first charge on the income (but not on the capital) of the property so specifically given, but if the legatee has other creditors the authorities are only entitled rateably with them to resort to the capital of the specifically bequeathed property and would have no claim for such duty against other property forming part of the deceased's estate passing to other persons."

M. Mesnil's evidence was to the same effect. In paragraph 3 of his affidavit he stated: "The only person directly liable to the fiscal authorities for the amount of the duty in the case of a legacy is the legatee himself, and as between the legatee and the fiscal authorities that position is not altered by a provision in the will under which the legacy is to be paid free of duty."

Jenkins, K.C., and *MacSwinney*, for the plaintiffs. The French mutation duty is payable, it is submitted, by Lady Sackville. Legacy duty is a duty payable in the first instance by the executors, but repayable on adjustment by the legatee. The French duty is another duty and is not covered by the term "legacy duty." According to the evidence the French duty is a personal debt of the legatee and the executor is under no liability to pay it. There is no case directly in point. [They referred to *In re Brewster* (1); *In re De Sommery* (2); *In re Johnston.* (3)]

Peterson, K.C., and *F. H. L. Errington*, for parties in the same interest, adopted the same argument and referred to the Stamp Act, 1815 (55 Geo. 3, c. 184), the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 18, and the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58.

Younger, K.C., *Maugham, K.C.*, and *Dighton Pollock*, for Lady Sackville. On the construction of the will it is submitted that Lady Sackville is entitled to this legacy free from the French duty. The testator knew of the existence of this duty and made his will with that knowledge. All the specific gifts in the will are given free of legacy duty, and it is submitted that the intention of the testator was that every duty should be paid by his executors which was necessary in order to enable the legatees to freely enjoy the property bequeathed to them. He did not use the term legacy duty as a term of art, but as a legal colloquial term as including all duties that might be payable. A gift of a specific legacy free of legacy duty is simply the addition to the specific legacy of a pecuniary legacy: *Farrer* v. *St. Catharine's College, Cambridge.* (4) But assuming on the construction of the will that Lady Sackville is not entitled to have this French duty paid as legacy duty, then it is submitted that she is entitled to have it paid by reason of the obligation of the executors to deliver possession of these chattels to her in England. It is the duty of executors to get in the chattels of their testator and to deliver them to the legatees chargeable only with the duties which are payable in this country on such chattels when they reach the hands of the legatees. The French authorities so far recognize the position of executors in England as to accept payment by them of the duty as if they were the legatees. The executors have treated these assets as if they were English assets, and under this will the obligation is on them to bring them over here and hand them to the legatee free of all duty. In *Perry* v. *Meddowcroft* (1) it was held that it was the duty of the executors to get in the property specifically bequeathed at the expense of the general estate. So too in *Cockerell* v. *Barber* (2) it was held in the case of a specific legacy of sicca rupees that the expense of remitting them to London must be paid out of the general estate. In Westlake on Private International Law, 5th ed. § 117 p. 152, it is laid down that "Any duty which must be paid abroad on the assets of a person whose last domicile was in England must be deemed to be paid out of his residue, so that his particular legatees will not have to contribute to it, notwithstanding that they would have to do so by the law of the country where the duty is imposed." For that statement *Peter* v. *Stirling* (3) is cited. [They also referred to *Field* v. *Peckett* (No. 3) (4) and *In re Pearce.* (5)]

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(1) [1908] 2 Ch. 365.

(2) [1912] 2 Ch. 622.

(3) (1884) 26 Ch. D. 538.

(4) (1873) L. R. 16 Eq. 19, 25.

C. Gurdon and *C. J. W. Farwell*, for other parties interested.

Peterson, K.C., in reply.

WARRINGTON J. The question is whether Lady Sackville as specific legatee under the testator's will of certain chattels situate in Paris or elsewhere in France at the time of the testator's death is entitled to have discharged out of his general assets a duty imposed in France upon legatees called the droits de mutation par décès. That is a duty payable on change of ownership by reason of death. The gift in question is a gift to Lady Sackville, free of legacy duty, of certain chattels. Two points were raised on her behalf—first, as a question of construction, that the Court ought to hold that the expression "legacy duty" includes the French duty, and secondly it was said that quite independently of construction, and even if the bequest had not been made free of legacy duty, she is entitled to have this French duty paid by the executors without recourse to her, on the ground that it is the duty of the executors to deliver to her these chattels, the subject of the bequest, and that they are unable to do so without paying this French duty.

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(1) (1841) 4 Beav. 197, 204.

(2) (1810) 16 Ves. 461.

(3) 10 Ch. D. 279.

(4) (1861) 29 Beav. 576.

(5) [1909] 1 Ch. 819.

First of all it is necessary to understand what this French duty is and upon whom it falls. That is very clearly explained in the affidavit of M. Astoul, a well-known French lawyer practising as an expert in London. What he says is this: [His Lordship read the paragraphs of the affidavit above set out, and continued:] There is nothing else, I think, that it is necessary for the present purpose to read. The other French lawyer who has given evidence on behalf of the legatee, M. Mesnil, makes substantially the same statement. In paragraph 3 of his affidavit he says: [His Lordship read the paragraph, and continued:] Then he says that the French death duty on a legacy is closely analogous to the English legacy duty, and expresses the opinion that in his view the gift ought to be treated as a gift free from that duty. So far as the facts of the French law are concerned the important point appears to be this, that the duty in question is a personal debt, imposed upon the actual legatee, and is not a charge upon the specific property, the subject of the legacy, although by certain proceedings the authorities may obtain a quasi charge—a charge upon the income of the legacy but not upon the legacy itself.

Upon those facts the two questions arise which I have mentioned. I will deal first with the question of construction. With regard to that it has been pointed out that there are other gifts in this will which are given free of legacy duty, and as to one of which, at all events, it has been contended that there is a ground for presuming that the testator intended by the expression "legacy duty" to include something much wider than that which we commonly understand by legacy duty. The testator begins his will by bequeathing to the National Gallery in Trafalgar Square certain pictures which are particularly mentioned as then being in Paris, and, therefore, liable to this mutation duty. Later on in the will he declares that all the foregoing bequests shall be free of legacy duty. In the case of the legacy to Lady Sackville the question does not depend upon a general declaration, as the legacy itself in the place where the gift is made is given free of legacy duty. The argument is that I ought to conclude that the testator intended that all his bequests of specific articles wherever situate should be free from all duties and impositions, by whatever authority imposed, and which are duties payable upon the passing of the property on death. The testator, it is to be observed, has used an expression which is perfectly well known in English law. Legacy duty has in many statutes been treated as the proper legal description of the duty which was originally imposed by the Legacy Duty Act, 1796. That Act and the subsequent Acts amending it had been frequently referred to in the statutes as "the Legacy Duty Acts," and the expression "legacy duty" is the duty imposed by these Acts. That is, therefore, a technical legal description for a particular duty imposed by Act of Parliament upon legacies in this country.

There is this further fact, that the testator being domiciled in England, English legacy duty is unquestionably payable upon the subject of this bequest, although part of it may be situate abroad. The importance of that is that the expression is not insensible if the Court comes to the conclusion that according to the true construction of the will when the testator used the words "legacy duty" he meant what is technically known as legacy duty. Bearing those considerations in mind, can I properly say that the testator has intended to free this legacy from all duties or impositions of the nature of legacy duty, or must I say that the intention he has expressed is to free it from legacy duty properly so understood? I think the latter is the true view. In my opinion if I were to give a wider interpretation to the words "legacy duty" than that which is its proper legal meaning in an English will, I should really be guessing at what the testator meant, and not ascertaining his intention as found in the words which he has used. I think it would be dangerous to presume what he would have been likely to have meant and then to give legal effect to that presumed intention. It seems to me I must determine his intention from the words he has used, and the words he has used, in my opinion, are confined to legacy duty in the strict sense of the words.

So far I have dealt with the question of construction. The other question is, I think, one of some difficulty. The argument on behalf of Lady Sackville is that, this being a specific legacy, it is the duty of the executors to deliver the subject of the legacy to the legatee, and that any expenses which they may incur in order to do that are charges and expenses incurred by them in their capacity of executors and therefore payable out of the general estate. Stated in that general way, I think the contention on the part of the specific legatee is correct, but the matter does not rest there, because the question then arises whether, assuming the executors to pay this French duty, the payment can be properly treated as such an expense incurred by them. *Peter* v. *Stirling* (1) has been much relied on in support of the contention that this particular duty is such an expense. But when that case comes to be looked at it seems to me that it is not an authority for the proposition contended for here, which is that the duty payable on a specific legacy is to be treated as an expense incurred by the executors. Stating it very shortly, the position in *Peter* v. *Stirling* (1) was this. The testator was entitled to considerable estate in England, and to considerable estate in Australia and in particular in the Colony of Victoria. He appointed executors here, and it was the duty of those executors to get in the estate situate in that Colony. Before they could do that they had to pay certain duties in that Colony which were in the nature of our present duty known as "estate duty." Those duties were not exactly probate duties, and they certainly were not legacy duties. They were duties which had to be paid on the whole of the testator's estate according to a certain graduated scale, and they had to be paid before the executor could obtain probate, and therefore before he obtained the full right to get in and recover the estate. Malins V.-C., before whom the case came, held that those duties were part of the expenses which had to be incurred by the executors in getting in and transmitting to this country the Australian assets, and in fact in completing the total of the estate which they had to administer, and that upon that footing and for that reason the duty was a duty which had to be borne

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(1) 10 Ch. D. 279.

WARRINGTON J.
1914
SCOTT, *In re.* SCOTT *v.* SCOTT.

by the executors and payable out of the general estate, and no part of it could be thrown on the pecuniary legatees. The only justification, if it were justification, for the contrary opinion would have been that by the Act of the Victorian Legislature the pecuniary legatees, if in that Colony, were under an obligation to contribute a certain proportion of this duty, which, as I have said, is like our estate duty, in proportion to their legacies. But that provision was a provision of a mere local nature and did not really affect the pecuniary legatees here in England or their rights. The substance of the decision was that this duty was originally in the nature of estate duty which had to be paid before the executors could begin to perform their duty under the testator's will of getting in the assets. It seems to me that that case is not an authority in support of the contention of the specific legatee in the present case. I think the answer and the complete answer to the case of the specific legatee here is that this mutation duty, as described by M. Astoul, is a debt due by the legatee, and, in order to succeed, the legatee has to shew that this will has imposed upon the executors the obligation of paying a debt of the legatee. If I had felt myself able to give to the words "free of legacy duty" a wider construction than that which I have felt compelled to adopt, then it may well be that I could have found in the will a direction that the executors should bear this debt which is not a debt of their own, but, being unable to put that construction upon the will, I cannot say that there is here, as a duty of administration distinct from a duty imposed by the terms of the will, any duty imposed on the executors of paying this debt of the legatee, which this mutation duty really is. In my opinion, therefore, the specific legatee is not entitled to have the duty paid out of the general assets of the testator.

Solicitors: *Capron & Co.; Meynell & Pemberton.*

W. I. C.

WARRING-
TON J.

1914

March 5.

In re Application of F. REDDAWAY & CO., LIMITED.

[1913 F. 1376.]

Trade Mark—Registration—Special Application—Registrable Mark—Distinctive Mark—Adapted to distinguish—Application to register Two Blue Lines with Red Line between—Imposition of Conditions of User—Jurisdiction of Court—Form of Order—Trade Marks Act, 1905 (5 *Edw.* 7, c. 15), *s.* 9, *par.* 5; *ss.* 12, 39.

The applicants applied under s. 9, par. 5, of the Trade Marks Act, 1905, to register as a trade mark for canvas woven fire-hose in class 50 two blue lines with a red line between. They had for twenty years at least made hose marked with these lines which were woven throughout the whole length of the fabric. The evidence shewed that hose so marked was well known and identified as being of the applicants' manufacture. The registrar refused to proceed with the application on the grounds (1.) that a coloured line woven into hose was not a registrable trade mark and (2.) that the mark was not distinctive. The applicants appealed to the Board of Trade, who referred the matter to the Court:—

Held, that the three lines of colour as appearing in the representation on the application form were not "adapted to distinguish" the goods of the applicants from those of other persons, but that if registered subject to a condition that no protection should be given to the mark except when used throughout the whole length of the fabric and substantially of the width shewn on the application form, the mark so defined would be adapted to distinguish.

Held, also, that under s. 12 read with s. 39 of the Act it was competent to the registrar to accept and for the Court to direct him to accept the mark of the applicants subject to such a condition.

Motion.

F. Reddaway & Co., Limited, of Manchester, who were the successors of a firm of the same name, were a company carrying on a business in the manufacture and sale of machine belting and hose for transmitting fluids and allied goods which had been in existence for a great number of years.

Among the goods made and sold by the company was included canvas hose for use in the transmission of fluids, as for example for use by fire brigades or on board ship and the like.

On October 5, 1912, the company made an application (No. 346,048) under s. 9, paragraph 5, of the Trade Marks Act, 1905, to register a trade mark consisting of three lines, two blue lines with a red line between them of about half an inch in width, in class 50 in respect of hose included in that class, and they desired that such registration should be limited to the colours blue and red exactly as shewn in the representation on the form of application.

On May 23, 1913, the registrar refused to proceed with the registration of the trade mark on the grounds (1.) that a coloured line woven into hose could not be a registrable trade mark and (2.) that the mark was not distinctive.

On July 18, 1913, the applicants gave notice of appeal from this decision to the Board of Trade, who referred the appeal to the Court.

The case now came on for hearing on motion by way of appeal from the registrar that his decision might be reversed or varied and that he might be directed to proceed with the application for registration.

It appeared from the evidence in support of the appeal that hose of the description in question could not be suitably, conveniently, or permanently marked with labels, tickets, names, and the like, and that it had long been a common custom in the trade for fire-hose of a particular firm to be marked and distinguished from the hose of other firms by the use of a distinctive colour stripe woven into the hose throughout its length. It had been found by experience that a mark of this kind was the most suitable for the purpose as it appeared on every length of the hose (however short such lengths might be), and it was entirely permanent and not subject to removal as would be the case with anything affixed to the hose. It further appeared that the use of distinctive marks of this description was in accordance with the requirements of the British Admiralty, the United States Navy Department, and the fire insurance companies of the United States. It also appeared that the applicants more than thirty years ago began to weave stripes of colour in hose of their manufacture for the purpose of indicating that such hose was of their manufacture and originated from them, and that for at least twenty years past hose of the applicants' manufacture had been marked with the particular mark which was the subject of the present application, and that hose so marked throughout the whole length was known and identified as manufactured by the applicants.

A. J. Walter, K.C., and *Sebastian*, for the applicants. The mark is, it is submitted, a distinctive mark within s. 9, paragraph 5, of the Trade Marks Act, 1905. The evidence shews that not only is the mark "adapted to distinguish" but that it has in fact distinguished the applicants' goods. Sect. 3, which defines "mark," "trade mark," and "registrable mark," contains no definition of the manner in which the mark is to be put on the goods. By s. 5, sub-s. 2, of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), a trade mark is to be deemed to be applied, whether it is woven, impressed, or otherwise worked into the goods. It would appear, therefore, that the mark may be woven into the goods: *Great Tower Street Tea Co.* v. *Smith.* (1) Here the evidence shews that the only practicable way to put the mark on hose is to weave it into the fabric. The mark is limited to the colours shewn in the application form in accordance with s. 10 of the Act. Prior to the present Act that could not have been done: *In re Hanson's Trade Mark.* (2) The rights under a patent and in a design are separate and distinct, but may co-exist: *Werner Motors* v. *A. W. Gamage.* (3) It is submitted, therefore, that the registrar was wrong in refusing the applicants' application, and that they are entitled to an order directing him to proceed with it. [They also referred to *In re Texas Co.'s Application* (4) and s. 64, sub-s. 10, of the Act.]

Sir S. O. Buckmaster, S.-G., and *Austen-Cartmell*, for the registrar. The mark is not a distinctive mark. There is no evidence shewing that any particular breadth of line, or that this particular arrangement of colours, except when the colours run through the whole length of the fabric, is distinctive. According to the representation of the mark on the application form the lines might run in any direction. The question is whether on the facts the applicants can succeed on this application, which is for registration of three colours in a

(1) (1889) 6 Rep. Pat. Cas. 165, 168.

(2) (1887) 37 Ch. D. 112.

(3) (1903) 21 Rep. Pat. Cas. 137.

(4) (1913) 31 Rep. Pat. Cas. 53.

row. Is that which is proposed for registration a mark? To determine that question the Court can only look at the definition of "mark" in s. 3 of the Act. The only heads under which this mark could by any possibility come are "device" and "heading." A line which runs the whole length of a hose cannot properly be described as a "heading," nor can three lines placed one on the top of another properly be described as a "device." Apart from colour there is no device, and three lines are no more distinctive than one line, in fact they are less so. The mark here is not distinctive within s. 9, paragraph 5, unless it is used in a particular manner. If any other maker marks his hose in such a manner to lead the public to believe that it is the hose of the applicants the latter are sufficiently protected by their remedy for passing off. They are not entitled to obtain a monopoly by registration. The real question is whether a combination of colours such as is proposed by the applicants ought to be admitted to registration. Sect. 10 shews that colour is not the determining factor in deciding whether a mark ought to be allowed to be registered. Sect. 12, sub-s. 2, provides that "Subject to the provisions of this Act the registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications." The "conditions" and "modifications" there mentioned have no reference to the manner in which the mark when registered is to be used. The sub-section provides a code of the conditions which may be imposed by the Court and it is not open to an applicant to say that he will submit to other conditions. The rights given to the proprietor of a trade mark by s. 39 are absolute, and the Court has no jurisdiction to impose conditions as to the user of the mark: *In re John Dewhurst & Sons' Trade Mark.* (1)

[WARRINGTON J. referred to the undertakings given in *In re "Apollinaris" Trade Mark* (2) and *In re Community of the City of Karlsbad's Application.* (3)]

By r. 21 of the Trade Marks Rules, 1906, every application for registration of a trade mark must contain a representation of the mark affixed to it. In this case the mark shewn on the application form is not the mark which the applicants propose to use. What they propose to use are coloured lines of indefinite length. Without colour what the applicants propose to register would be a blank. [They also referred to ss. 15, 21, 23, and 24 of the Act.]

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(1) [1896] 2 Ch. 137.

(2) [1907] 2 Ch. 178.

(3) (1912) 29 Rep. Pat. Cas. 162.

A. J. Walter, K.C., in reply. The mark consists of a blue line, a red line, and another blue line outside, and is a mark which is well recognized as the mark of the applicants. It is said that the applicants have their remedy in the case of passing off, but the object of trade marks is to simplify passing-off actions. Sect. 12, sub-s. 2, is not the relevant subsection, but s. 12, sub-s. 4, which does not contain the words "Subject to the provisions of this Act." The applicants are willing that the following condition should be attached to their user of the mark: "that no protection shall be given by this registration to the mark except when used throughout the whole length of the fabric and substantially of the width shewn in the application form." That condition would meet every objection which can be raised to a wider protection being given to the mark.

[WARRINGTON J. referred to *In re Verschure and Zoon's Application.* (1)]

WARRINGTON J. This is an appeal referred to the Court by the Board of Trade from the refusal of the Registrar of Trade Marks to proceed with the consideration of an application by F. Reddaway & Co., Limited, for the registration of a trade mark. The application is for the registration of three lines, two blue lines with a red line between them, of about half an inch in width. The application states that the goods in respect of which the trade mark is to be used consist of hose included in class 50. Class 50 is the miscellaneous class, and the particular part of the class is sub-head 9, which includes hose. The application also states that the applicants desire that the trade mark when registered may be limited to the colours blue and red, exactly as shewn in the representation on the application form. I take it that means that it may be limited to the colours, blue and red, arranged as appears upon the representation, that is to say, blue at the top, then red and then blue again. It is suggested that this statement has to do also with width, but I do not think that is so on the proper construction of the application. I think those words are inserted in the application for the purpose of enabling the applicants to avail themselves of s. 10 of the Act. That is the trade mark that is proposed to be registered. The evidence is that the hose in respect of which the mark is to be used is canvas woven fire-hose. The evidence further goes to this, that for twenty years at least, last past, the applicants have used a mark consisting of three lines of colour, a red line between two blue lines, upon all the fire-hose made by them; that all that hose has been marked with those lines of colour throughout its length for the purpose of distinguishing the applicants' hose from that of any other manufacturer. Further, the object with which their hose has been manufactured in this particular way has been to comply with the requirements of the British Admiralty, the United States Navy Department, and the fire insurance companies of the United States, all of whom require that, in order that there may be no question as to the manufacture of a particular length of fire-hose, all fire-hose shall be marked with lines of colour woven into the fabric and extending throughout the whole length. It is further proved that fire-hose marked with the blue, red, and blue lines throughout its length is known as and identified with the manufacture of the applicants, or, to put it the other way round, that when a man, familiar with such things, sees a hose with those lines woven in throughout its length, he knows that it is of the applicants' manufacture and of no other.

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(1) (1905) 22 Rep. Pat. Cas. 568.

In those circumstances the applicants applied to register the mark represented upon the application form, that is to say, three lines of colour. The registrar has refused to proceed with that application, and has given his reasons for so refusing. The real objection to the registration appears to me to be this: that the mark as shewn upon the application form would not be adapted to distinguish the goods of the applicants; that what does distinguish, and may be said to be therefore adapted to distinguish, the goods of the applicants is the fact that the hose is made with those lines of colour extending throughout the whole length of it. That being so, can this present application be proceeded with? For this purpose one has to look at the Act and see what it is that can be registered as a trade mark. The first question to be considered is, Are those three lines of colour a mark? "Mark" includes for the purposes of the Act "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof": s. 3. The Act does not say that to be a mark it must be one or other of those things. All it says is that it shall include those things. As at present advised, I see no reason why three lines of colour woven into a fabric should not be a mark. Whether it is a trade mark or whether it is a registrable trade mark are quite separate questions. I hold accordingly that those three lines of colour come within the definition of a mark in the Act.

Then the next question is, Can those three lines of colour be a trade mark? A trade mark is defined to be "a mark used, or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture," and so on. This mark is, without doubt, proposed to be used upon the goods for the purpose of indicating that they are goods manufactured by the applicants. The weaving of the mark into the fabric seems to me to be a user thereof upon the goods. I think therefore that the three lines of colour may be a trade mark. Is it then a registrable trade mark? A registrable trade mark means a "trade mark which is capable of registration under the provisions of this Act." Whether it is so capable depends upon the true construction of s. 9: "A registrable trade mark must contain or consist of at least one of the following essential particulars"; paragraph 5 is the only one which is applicable here: "Any other distinctive mark." It includes therefore any mark and would include, in my opinion, the three colours, but the mark must further satisfy the condition that it is to be distinctive. Then we have to see what that means. Distinctive means "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." Are the three lines of colour adapted to distinguish the goods of the applicants from those of other persons? For the purpose of determining that question I am entitled to take into consideration the fact that the application is limited to the three colours in question. What I have, therefore, to consider is whether the mark in those three colours, blue, red, and blue, is adapted to distinguish. In my opinion, simply as standing upon the application, without more, the three colours are not adapted to distinguish. I do not see how it is possible to say that lines of colour placed upon the goods as shewn in the representation on the application form could, upon the present evidence, be held to be adapted to distinguish the goods of the applicants from those of other persons, and if the matter stood there I should, I think, be compelled to refuse the application. But the matter does not quite stand there, because it is suggested that the mark might be registered with such conditions that it might become distinctive, and I have to consider whether there is power to impose the particular condition which the applicants suggested. The condition which they suggest is this: "that no protection shall be given by this registration to the mark except when used throughout the whole length of the fabric and substantially of the width shewn on the application form." I think the mark so used would, on the evidence, be adapted to distinguish the goods of the applicants from the goods of other persons, and what I really have to consider is whether there is power in the Court or in the registrar to direct such a limited registration as that which is suggested. The provisions with regard to that are contained in s. 12. As to the power of the registrar the provisions are in sub-s. 2: "Subject to the provisions of this Act the registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications." Then sub-s. 4 refers to appeals such as that with which I am dealing, and enables the Court to make an order "determining whether, and subject to what conditions, amendments, or modifications, if any, the application is to be accepted." I am not dealing at the present moment with the actual question whether the registrar should accept the application. What I am dealing with is the question whether the registrar shall proceed with it with a view to accepting or rejecting it. Sect. 39, which is the section enacting what shall be the rights of the proprietor of the registered trade mark, is in these terms: "Subject to the provisions of section 41 of this Act and to any limitations and conditions entered upon the register, the registration of a person as proprietor of a trade mark shall, if valid, give to such person the exclusive right to the use of such trade mark upon or in connexion with the goods in respect of which it is registered." Taking s. 12 and s. 39 together, it appears to me that it is competent for the registrar to accept and for the Court to direct him to accept an application subject to a condition which shall modify the exclusive right given to the proprietor by s. 39. In terms there is no limit in s. 12 to the condition or the kind of condition which the Court may impose, and I see no reason therefore why the registrar or the Court should not impose such a condition as that suggested by the applicants, which is in fact a condition limiting the nature of the mark, and although, but for that condition, I should have felt myself bound to refuse the application, I think that, the applicants submitting to have that condition imposed upon them, if the application is ultimately accepted, I am justified in directing that the registrar do proceed with the application. But it must be subject to their submitting to that condition if the registrar eventually accepts the application.

The order as passed and entered (so far as material) was as follows:

"Upon motion this day made unto this Court by counsel for the above named F. Reddaway & Co., Limited, and upon hearing counsel for the Registrar of Trade Marks and upon reading" &c. "And the applicants by their counsel undertaking to modify their application dated 5 October 1912 by limiting it to the colours blue and red substantially of the width and as shewn thereon and throughout the whole length of the hose

"This Court doth order that the said Registrar do proceed with the registration of the above-mentioned application modified by limiting the mark to the colours blue and red in stripes or lines substantially of the width and form as shewn on such application and extending throughout the whole length of the hose.

"And it is ordered that the applicants do pay to the said Registrar his costs of the said motion to be taxed by the Taxing Master."

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F. REDDAWAY & CO.'S APPLICATION, *In re.*

Solicitors: *W. J. & E. H. Tremellen, for Blair & Seddon, Manchester; Solicitor to the Board of Trade.*

W. I. C.

In re RYDER.

BURTON *v.* KEARSLEY.

[1913 R. 1928.]

WARRINGTON J.
1914
March 11.

Will — Construction — Life Tenant — Power to apply Corpus for his own Benefit—Appointment by Deed Poll—Absolute Interest.

Testatrix appointed her husband and another person (who disclaimed) her executors and trustees, and gave her real and personal estate to her trustees upon trust for sale and conversion and investment of the proceeds, and to stand possessed thereof upon trust as to one third of the income to pay the same to her mother (who predeceased the testatrix) during her life, and after her death to pay the same to her husband until he should marry again or die, and as to the remaining two thirds of the income upon trust to pay the same to her husband until he should marry again or die, and she thereby authorized her husband so long as he was entitled to the income of part or of the whole of her estate to apply such portion of the corpus of her estate as he should think fit for his own use and benefit, and subject as aforesaid gave her estate for certain charitable purposes.

The testatrix died in 1910. Her husband did not marry again, and died having by a deed poll appointed the corpus of the testatrix's estate to himself for his own absolute use and benefit:—

Held, that on the true construction of the testatrix's will the husband had power in his lifetime to appoint the corpus of the whole estate to himself absolutely, and that he became absolutely entitled under the joint effect of the will and deed poll.

In re Richards [1902] 1 Ch. 76 followed.

Dictum of James L.J. in *In re Thomson's Estate* (1880) 14 Ch. D. 263, 264, considered.

ADJOURNED SUMMONS.

Alice Ann Ryder made her will, dated September 7, 1907, written in paragraphs. By paragraph 2 she appointed her husband, Thomas Ryder, and W. A. Hare her executors and trustees.

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By paragraph 4 she devised and bequeathed to them all her real and personal estate on trusts for sale and conversion and investment of the proceeds and to stand possessed thereof upon trust as to one third of the income thereof to pay the same to her mother during her life and after her death to pay the same to her husband for his own absolute use and benefit until he should marry again or die (whichever should first happen); and upon trust as to the remaining two thirds of the income thereof to pay the same to her husband for his own use and benefit until he should marry again or should die (whichever should first happen). Paragraph 5 proceeded, "I authorise my husband so long as he is entitled to the income of part or of the whole of my estate to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit"; and by paragraph 6 she directed that "subject as aforesaid" her trustees should hold her estate for certain charitable purposes therein directed.

The testatrix's mother died on June 6, 1910, and the testatrix died on July 7, 1910. W. A. Hare renounced probate and disclaimed the trusts.

Thomas Ryder did not marry again, and on February 28, 1911, executed a deed poll whereby (after reciting the testatrix's will and that the testatrix was at her death entitled to the real and personal estate specified in the schedule thereto; and that Thomas Ryder was desirous of making such appointment of the corpus of the testatrix's estate for his own use and benefit as was thereinafter contained) in exercise of the power given to him by the said will he purported to appoint the net moneys to arise from the sale of the real estate specified in the schedule thereto and all the personal estate specified therein, and all other, if any, the investments representing the corpus of the testatrix's estate, unto himself for his own absolute use and benefit.

Thomas Ryder died on August 24, 1913, having made a will dated May 22, 1913, whereby he appointed F. Burton and W. Kearsley executors and trustees, and, after giving certain specific and pecuniary legacies, gave the remainder of his estate to W. Kearsley absolutely.

This was an originating summons taken out by F. Burton against W. Kearsley and the Attorney-General raising the question whether upon the true construction of the testatrix's will Thomas Ryder by the joint effect of the will and deed poll became absolutely entitled to the estate of the testatrix, or whether he was entitled thereto for life only.

A. L. Ingpen, for the plaintiff.

Clauson, K.C., and *R. H. Hodge*, for the defendant Kearsley. The power to "apply" the corpus for his own use and benefit conferred on the husband by paragraph 5 of the will authorized an appointment inter vivos in his own favour. The point is covered by authority: *Scott* v. *Josselyn* (1); *Pennock* v. *Pennock* (2); *In re Thomson's Estate* (3); *In re Richards.* (4) No transfer was required since the husband as sole executor had only to add the beneficial to the legal ownership.

Austen-Cartmell, for the Attorney-General. The power conferred by paragraph 5 of the will was one which the husband might no doubt exercise in his lifetime by raising any portion of the corpus and applying it for his immediate purposes, but it did not authorize him to alter the trusts of the will and make the property his own without actually reducing it into his possession. If after executing the deed poll he had married again, it could not have been said that he had "applied" the property for his own use and benefit within the meaning of the will. He has not in fact "applied" the corpus at all, but has left it as it was. In *Scott* v. *Josselyn* (1), where the language was almost identical with the language of the present will, the actual question did not arise for decision, and Romilly M.R. in his judgment deals with it as if it had been a power for the tenant for life to "dispose of" the capital, so that his dictum really comes to nothing. Similarly in *Pennock* v. *Pennock* (2) there had been no attempted exercise of the power and the observations of Malins V.-C. are obiter merely. *In re Thomson's Estate* (3) is in my favour, especially the observations of James L.J. on appeal, where he says, "My own strong inclination of opinion is that the widow took nothing but an estate for life with a full power of enjoying the property

(1) (1859) 26 Beav. 174.

(2) (1871) L. R. 13 Eq. 144.

(3) (1879) 13 Ch. D. 144; on appeal (1880) 14 Ch. D. 263, 264.

(4) [1902] 1 Ch. 76.

in specie, so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie." In *In re Richards* (1) the language was different from the language of the will in the present case.

WARRINGTON J. The question in this case is whether certain property once part of the estate of the testatrix, Alice Ann Ryder, is to be treated as still part of her estate or as part of the estate of her husband, Thomas Ryder, and that depends entirely on the true construction of the will of the testatrix. [His Lordship stated the facts and continued :] The defendant Kearsley, who is the residuary legatee under the husband's will, contends that so much of the estate as was vested in the husband at the date of his death was the absolute property of the husband and passed under his will. The Attorney-General contends that, so far as the wife's estate can be traced and has not been completely applied by the husband, it is now subject to the charitable purposes declared by the will. The question depends on the construction of the fifth paragraph of the will—whether it conferred on the husband a general power of appointment. I do not think that it gave him any power of appointment by will, but in my opinion it did give him power to appoint such portion of the estate as he should think fit for his own use and benefit during his lifetime. Suppose that he had desired to appoint the estate for the benefit of some third person, that would have been one mode of applying it within the meaning of the will. If he could do that, I see no reason why he should not appoint the estate in favour of himself, and in my opinion this clause gave him absolute power inter vivos to do with the corpus whatever he thought fit for his own use and benefit. If he considered that the best thing to do was to put the property in his own possession he was entitled to do so, and the execution of the deed poll was only the machinery by which he applied the property for his own benefit. So far I have treated the question apart from authority. With regard to the authorities I have been referred to *Scott* v. *Josselyn* (2), *Pennock* v. *Pennock* (3), and *In re*

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(1) [1902] 1 Ch. 76.

(2) 26 Beav. 174.

(3) L. R. 13 Eq. 144.

Thomson's Estate. (1) Those cases were all very similar to the present case, but in none of them was there any express decision on the point. The question arose after the death of the person in the position of the husband in the present case and after the death of that person without having exercised the suggested power of appointment. But in each of those cases without exception the contest was between those who contended that the tenant for life had a power of appointment only and those who contended that he was absolute owner of the property; and in each case the Court decided that he was not absolute owner, but that the property passed under the gift over. But in each case, with one exception, the Court expressed the opinion that the tenant for life had power to appoint the property inter vivos. The only exception is that of James L.J., who, though it was not necessary to the decision, said in *In re Thomson's Estate* (2) that the strong inclination of his opinion was that the tenant for life "took nothing but an estate for life with a full power of enjoying the property in specie, so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie." That, however, was nothing more than a dictum, and moreover the words in the will then before the Court differed materially from those of the present will. But there is another authority—*In re Richards* (3), decided by Farwell J.—which seems to me directly in point. In that case the question arose in the lifetime of the tenant for life who took out the summons to determine what interest she took in the capital of the estate. The testator had given the income to her for life and directed that, if such income should not be sufficient, she was to use such portion of his real and personal estate as she might deem expedient—in substance a provision the same as that in the will now before me. I can see no distinction between them. The only question was as to the meaning of "such part as she may deem expedient," and it was contended on the authority of *In re Pedrotti's Will* (4) that the tenant for life could only resort to the capital if the income

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(1) 13 Ch. D. 144; 14 Ch. D. 263.

(2) 14 Ch. D. 264.

(3) [1902] 1 Ch. 76.

(4) (1859) 27 Beav. 583.

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was in fact insufficient. But Farwell J. said that in his opinion the tenant for life was to be the judge whether the income was sufficient or not, and that though in form conditional there was therefore no real condition at all, and he decided that the lady had a general power of appointment inter vivos. I come to the same conclusion here, and I hold that the husband was absolutely entitled to the property at the date of his death.

Solicitors: *Johnson, Weatherall & Sturt; the Treasury Solicitor.*

A. C.

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March 18.

CROYDON RURAL DISTRICT COUNCIL *v.* BETTS.

[1913 C. 3350.]

Local Government—Private Street Works—Notice to make up Road—Service on Owner of several Houses in same Road—Non-compliance with Notice—Execution of Works by Local Authority—Apportionment of Expenses—Non-payment by Owner of Apportioned Sum—Charge on Premises—Charge, whether for whole Sum on all Premises of Owner, or for Apportioned Part in respect of each of Premises—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 150, 257.

A local authority under the powers vested in them by s. 150 of the Public Health Act, 1875, served upon the owner of certain houses and plots of building land, fronting on two roads within their district, notices to make up the two roads opposite his premises. The owner did not comply with the notices and the local authority executed the works themselves and subsequently sent in a demand to him for an apportioned part of the expenses incurred by them. The owner did not pay, and thereupon the local authority issued a summons against him claiming (inter alia) a declaration that they were entitled under s. 257 of the Act to a charge for the full amount due on all the premises of the owner in the two roads:—

Held, that under s. 257 the local authority were only entitled to a charge for an apportioned sum in respect of each of the premises fronting on the road in respect of which the apportioned expenses were incurred.

ADJOURNED SUMMONS.

In 1907 the plaintiff council were invested by the Local Government Board with urban powers under s. 150 of the Public Health Act, 1875 (1), in respect of certain streets known as

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(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say,

. . . .

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Bencombe Road and Burcott Road in the parish of Coulsdon, Surrey, within their district.

"'Owner' means the person for the time being receiving the rackrent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent . . . ."

Sect. 150. "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice.

"Before giving such notice the urban authority shall cause plans and sections of any structural works intended to be executed under this section, and an estimate of the probable cost thereof, to be made under the direction of their surveyor . . . . such plans sections and estimate shall be deposited in the office of the urban authority, and shall be open at all reasonable hours for the inspection of all persons interested therein during the time specified in such notice; and a reference to such plans and sections in such notice shall be sufficient without requiring any copy of such plans and sections to be annexed to such notice.

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses. . . . ."

Sect. 257. "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. . . .

"Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive

The defendant was the owner of certain premises in Bencombe Road consisting of a house and garden known as "The Bryn" with a frontage to the road of 178 feet, a piece of building land with a frontage of 529 feet, and a house and garden known as "Matheran" with a frontage of 180 feet. He was also the owner of premises in Burcott Road consisting of a piece of building land with a frontage of 210 feet and of five houses and gardens respectively known as "Burcott," "Upmeads," "Brockweir," "Kie-E-Lam," and "Kukkolind," having respectively frontages to the road of 118 feet, 47 feet, 96 feet 6 inches, 103 feet, and 96 feet 6 inches.

On April 10, 1911, the plaintiff council, in pursuance of s. 150, served on the defendant as the owner or occupier of the premises above mentioned notices requiring him to level, pave, metal, channel, and make good within one calendar month from the date of the service of such notices certain parts of Bencombe Road and Burcott Road. The notices contained notifications that plans, sections, and estimates had been prepared and deposited as required by the section.

The notices not having been complied with, the plaintiff council executed the works referred to therein and in further pursuance of s. 150 on October 15, 1912, served on the defendant notices of apportionment whereby the following sums were apportioned to be paid by the defendant as the owner of the premises fronting, adjoining, or abutting upon the roads in question, such apportionment being according to the frontage of his premises to such roads respectively, namely, in respect of the premises fronting, adjoining, or abutting on Bencombe Road the sum of 380*l.* 13*s.* 5*d.*, and in respect of the premises fronting, adjoining, or abutting on Burcott Road the sum of 299*l.* 3*s.* 1*d.*

No notice as required by s. 257 of the Act for the purpose of disputing the apportionments or either of them was given by the defendant.

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on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same. . . . ."

On March 28, 1913, the plaintiff council served on the defendant demands for the payment of the sums of 380*l.* 13*s.* 5*d.* and 299*l.* 3*s.* 1*d.* and interest on the said sums respectively at the rate of 5*l.* per cent. per annum from March 28, 1913, until payment.

The defendant having failed to pay these sums, the plaintiff council took out the present summons asking for (1.) a declaration that they were entitled under s. 257 of the Public Health Act, 1875, to a charge on the defendant's premises in Bencombe Road and Burcott Road for the sum of 679*l.* 16*s.* 6*d.*, being the apportioned expenses incurred by the plaintiff council in executing private street works under s. 150 of the Act and payable by the defendant in respect of the premises respectively, together with interest on the said sum of 679*l.* 16*s.* 6*d.* at 5 per cent. per annum from March 28, 1913, the date of service of a demand for such expenses, together also with the plaintiffs' costs of the action, and that such charge was entitled to priority over any other mortgage or charge on the said premises (if any); (2.) an inquiry as to incumbrances; (3.) a sale; and (4.) a receiver.

The defendant did not dispute the fact that the plaintiff council were entitled to a charge on the premises under s. 257. The only question was as to the form the charge took and as to the form in which the declaration asked for should be given.

W. R. Sheldon, for the plaintiff council. The question in this case arises on the construction of ss. 150 and 257 of the Public Health Act, 1875, whether the local authority are entitled to one charge on the whole of the property improved or to a separate charge in respect of each item of the property. Under s. 150 the local authority are entitled to serve upon the respective owners or occupiers of premises notices requiring them to make up the road fronting their premises. By s. 4 "owner" is defined as the person for the time being in receipt of the rackrent of the premises. The defendant answers this description. Sect. 257 enables the local authority to do the necessary work themselves if the owners fail to do it and provides that in the event of their so doing the expenses incurred "shall be a charge on the premises in respect of which they were incurred." The result of the authorities is that the person who is the owner of the premises at the time when the works are completed is the person liable. It is submitted that on the true construction of s. 257 the charge thereby given is a charge on the whole of the premises of the owner who is liable when the works are completed. There is no obligation on the local authority to sever the premises. The charge created by s. 257 is a charge not on the interest of any particular owner but on the total ownership, that is to say, on the respective interests of every owner for the time being in proportion to the value of his interest: *Birmingham Corporation* v. *Baker*. (1) It is a charge on the premises as a whole and is therefore a charge on the mortgagee's interest as well as on that of the mortgagor. In the present case, although the summons asks for a charge for 679*l*. 16*s*. 6*d*. on all the defendant's premises in Bencombe Road and Burcott Road, that claim is not now persisted in. The plaintiff council now ask for a charge for 380*l*. 13*s*. 5*d*. in respect of the premises in Bencombe Road and for a charge for 299*l*. 3*s*. 1*d*. in respect of the premises in Burcott Road. [He also referred to Seton on Judgments, 7th ed. p. 1988.]

Owen Thompson, for the defendant, was not called upon.

WARRINGTON J. This is an application by the rural district council of Croydon against Frederick Betts and it asks for a declaration that under s. 257 of the Public Health Act, 1875, the plaintiff council are entitled to a charge for 679*l*. 16*s*. 6*d*., the expenses incurred by them in executing street works, on the whole of certain properties belonging to the defendant. The only question is whether the plaintiff council are entitled to a charge for the whole sum on the whole of the defendant's properties or to a charge for the proper apportioned part in respect of each of the separate properties.

The decision of the question depends on the true construction of ss. 150 and 257 of the Public Health Act, 1875. [His Lordship read the material provisions of ss. 150 and 257 of the Act, observing that the words "such owner" in the second clause of the latter section must mean the owner of the premises in respect of which the expenses were incurred at the time when the works were completed. He continued:] Before I leave those sections there are one or two things to be noticed. First, the owner, who is defined by s. 4 of the Act to be the person for the time being receiving the rack rent of the premises to whom the notice is given under s. 150, may not be the same person as the owner at the time when the works are completed for the purposes of s. 257. Secondly, it has been decided that so far as the charge is under s. 257 it is a charge on the premises and not on the interest of the person who is in receipt of the rents and profits of the premises when the works are completed. It is a charge on the whole of the premises, so that while the owner may be a mortgagor in possession it is not a charge on the equity of redemption in the premises but on the entire premises—it is a charge on the property of the mortgagee as well.

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(1) (1881) 17 Ch. D. 782.

The facts of the case are these: Within the district of the plaintiff council are two roads, Bencombe Road and Burcott Road. These roads had not been made up. In Bencombe Road the defendant was the owner of a piece of building land on the north side, of a piece of land which had been building land with a house on the north side of the road, and of another piece of land on the south side of it. All these lands fronted on Bencombe Road. In Burcott Road the defendant was the owner of a piece of land with no house upon it on the north side and of five houses on the south side. The frontages varied in Bencombe Road; the frontage of the land at the west end was 178 feet; that of the unoccupied piece of building land on the north side was 529 feet; the piece of land with a house on the south side was 180 feet. In the same way in Burcott Road the unbuilt upon land had a frontage of 210 feet. The frontages therefore were all of varying widths.

The plaintiff council gave notice under s. 150 of the Act to the defendant as owner to make up the roads in front of his premises. He did not do so. The plaintiff council thereupon did the work themselves, and, by their surveyor, they made two separate apportionments of expenses, one in respect of the premises in Bencombe Road by which a separate sum was attributed to each of the defendant's three pieces of land in that road, and the other in respect of the premises in Burcott Road by which also a separate sum was attributed to each of the defendant's six pieces of land in that road.

The plaintiff council claimed by their summons that they were entitled to a charge for the whole sum of 679*l.* 16*s.* 6*d.* on the whole of the defendant's premises in the two roads. At the Bar they abandoned that claim and contended that they were entitled to a charge for 299*l.* 3*s.* 1*d.* in respect of all the defendant's premises in Burcott Road and to a further charge for 380*l.* 13*s.* 5*d.* in respect of all the defendant's premises in Bencombe Road. The defendant on the other hand contended that what the plaintiff council were entitled to was a charge on each of the separate premises for the sum apportioned in respect of those premises. In my opinion the latter contention is right. There is no express provision in the Act upon the point. The charge is a charge not on the interest of the owner but on the property itself. Having regard to that fact it follows that it is only rational to hold that the Legislature intended that there should be a separate charge on each separate plot; otherwise I fail to see how the charge could be worked. It would for example be extremely unfair to the mortgagee of a small house or piece of land that that house or land should be charged with a large sum in respect of unoccupied building land belonging to his mortgagor. Sect. 257 confirms that view; the charge is to be a charge on the premises in respect of which the expenses are incurred. When one looks at the provisions of that section for apportioning the expenses one must infer that the Legislature regarded the premises in respect of which the expenses were incurred, namely, those which fronted on the road, each as separate premises, and treated the expenses as incurred in respect of these separate premises. On the whole I think on the true construction of s. 257 that the Act intended that the expenses should be apportioned in respect of each separate piece of land fronting on the road and that the charge should be in respect of each such separate piece of land.

Solicitors: *Whitford & Thorp; Nevile & Smith.*

W. I. C.

In re PALFREEMAN.

PUBLIC TRUSTEE *v.* PALFREEMAN.

[1913 P. 2074.]

SARGANT J.

1914

March 4.

Will—Residue—Legacy at Twenty-three—Age attained in Lifetime of Testator—Interest, from what Date payable.

A testator gave his residuary estate upon trust, subject to an annuity, to pay 2000*l.* to each of his three sons and 1000*l.* to each of his four daughters on their respectively attaining the age of twenty-three years, and directed the residue of the trust estate to be held upon certain trusts. The testator's eldest son and eldest daughter respectively attained twenty-three in his lifetime:—

Held, that the legacies to the eldest son and eldest daughter respectively became ordinary immediate legacies, and carried interest not from the death of the testator but at the expiration of one year from his death.

Coventry v. *Higgins* (1844) 14 Sim. 30 and *Pickwick* v. *Gibbes* (1839) 1 Beav. 271 questioned.

ADJOURNED SUMMONS.

Thomas Palfreeman by his will dated May 23, 1898, after appointing three persons to be the trustees and executors thereof, gave and devised all his real and personal estate not thereby otherwise disposed of unto his trustees upon usual trusts for sale and conversion, and out of the moneys produced by such sale and conversion and his ready money to pay his debts and funeral and testamentary expenses, and to invest the net residue of the said trust moneys in usual trust investments, and to stand possessed of the said residuary trust moneys and the investments representing the same (thereafter called the residuary trust funds) upon trust in the first place to pay the sum of 120*l.* per annum to his wife during her life, and to pay the sum of 2000*l.* to each of his three sons and 1000*l.* to each of his four daughters as and when they respectively attained the age of twenty-three years, and upon further trust to carry on and manage his farms as therein mentioned, and the testator declared that his trustees should accumulate the residue of his trust estate during the lifetime of his wife and until his youngest child for the time being should attain the age of twenty-three years, and on the happening of those events he directed them to pay the further sum of 1000*l.* to each of his daughters then living and to the lawful issue of any of them who might have died in the meantime, such issue taking their deceased parents' share only as and when they respectively attain the age of twenty-one years, and to pay and divide the residue thereof unto and equally between his sons then living and to the lawful issue of any of them who might have died in the meantime, such issue taking their deceased parents' share only as and when they respectively attain the age of twenty-one years. And the testator empowered his trustees to postpone the sale and conversion of his real and personal estate or any part thereof for as long as they should think fit.

The testator by a codicil dated January 7, 1901, to his said will, after reciting that he had placed his eldest son William Henry on a farm and given him a sum of 2000*l.* to enable him to carry on the same and had given his eldest daughter Annie Eliza the sum of 1000*l.*, expressly declared that the ultimate shares of his said eldest son and eldest daughter under the trusts of his will should be reduced by the sums of 2000*l.* and 1000*l.* respectively so given to them as aforesaid, and the testator increased his wife's annuity to 200*l.* per annum and, after making a certain pecuniary and specific bequest and devise to his youngest son, in all other respects confirmed his said will.

The testator died in March, 1901. His wife survived him.

In December, 1912, the Public Trustee was duly appointed sole trustee of the testator's will and codicil.

All the testator's seven children survived him and all respectively attained the age of twenty-three years; but two of them, namely, the eldest son and the eldest daughter, respectively attained that age in the lifetime of the testator.

Maud Palfreeman, the youngest child of the testator, attained her age of twenty-three years in September, 1912.

The Public Trustee took out a summons to determine questions of construction and administration that had arisen under the will and codicil. One of such questions related to the legacies of 2000*l.* and 1000*l.* given respectively to the eldest son and eldest daughter, which had not been paid in the belief that they had been discharged by the payments made to them respectively by the testator in his lifetime as recited in the codicil. But the Court held that the legacies in question had not been discharged by such payments and were payable forthwith, and that the payments made by the testator as recited in the codicil were to be deducted from the postponed interests given to the eldest son and eldest daughter after the death of the widow in the ultimate residue of the estate.

The question then arose whether the two legacies in question carried interest from the death of the testator or at the expiration of one year from his death.

The summons was heard by SARGANT J. for NEVILLE J.

A. Adams, for the plaintiff.

G. T. Simonds, for the eldest son and the eldest daughter. The general rule as to interest on legacies does not apply where the testator stands in loco parentis to the legatee, and the legacy is payable on an event which happens in the testator's lifetime. In such a case the legacy is accelerated and becomes payable on the death of the testator and carries interest from that date: Theobald on Wills, 7th ed., p. 190; *Pickwick* v. *Gibbes* (1); *Coventry* v. *Higgins*. (2) These cases are adversely commented on in the last edition (the 6th) of Jarman on Wills, vol. ii. p. 1110, but they have stood unchallenged by any authority for eighty years and are, it is submitted, good law. There is a further note in the addenda to Jarman on Wills, 6th ed. vol. i. p. cccvii., where *In re White* (3) is referred to, but there is nothing in that case which deals with or purports to overrule the authority of those two cases.

Owen Thompson, for a residuary legatee. It is submitted that where there is a clear legacy payable on the happening of an event, and the event happens in the testator's lifetime, the effect is to make the legacy an immediate legacy payable like any ordinary legacy, and the general rule as to interest applies: *Laundy* v. *Williams*. (4) The cases of *Pickwick* v. *Gibbes* (1) and *Coventry* v. *Higgins* (2) may be distinguished on the ground that in each of them there was a severed fund and a direction for maintenance, which shewed that the testator intended the legacy to be an interest-bearing fund from the first. But if they apply, it is submitted that the criticism on them in Jarman on Wills, 6th ed. vol. ii. p. 1110, is sound. On principle there is no reason why a deferred legacy which becomes payable on the testator's death should begin to carry interest before an ordinary immediate legacy. Joyce J. in *In re White* (1) distinguishes that case from *Laundy* v. *Williams* (2) on the ground that it was not a general legacy, and seems to have relied on *In re Waters* (3), which was really not in point and on principle does not govern the present case. *Laundy* v. *Williams* (2) is difficult to understand, but the decision justifies the first point in its head-note.

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(1) 1 Beav. 271, 273.

(2) 14 Sim. 30.

(3) (1909) 101 L. T. 780.

(4) (1728) 2 P. Wms. 478.

G. T. Simonds in reply.

D. D. Robertson, for the widow and the youngest daughter of the testator.

P. F. Stokes, for other parties interested.

Sargant J. Having decided that the legacies of 2000*l.* and 1000*l.* given by the testator's will to his eldest son and eldest daughter are not cancelled by the codicil and that the sums paid to those two legatees by the testator in his lifetime are to be deducted from their shares in the ultimate residue of the estate, I have now to decide whether interest is payable on those two legacies from the death of the testator or at the expiration of one year from his death. The legacies are given in these words: [His Lordship read the clause in the will and continued.] At the date of the will all the testator's children were under twenty-three years of age, and prima facie the effect of the direction to pay the legacies at twenty-three was to postpone payment until each child attained that age. It happened, however, that two of the children attained twenty-three in the testator's lifetime, and the question is whether that event operated to accelerate the two legacies and made them payable at the death of the testator, or whether like ordinary legacies they are payable within one year from his death. If the matter were without authority I should say that the obvious intention

(1) 101 L. T. 780.
(2) 2 P. Wms. 478.
(3) (1889) 42 Ch. D. 517.

of the testator was to postpone payment of the legacies until the event happened and not to accelerate them. I think the direction was put in not for fixing the date of payment absolutely but for fixing a date before which payment should not be made, and selecting a period at which the legatees would have attained more discretion in dealing with money. But two cases of *Pickwick* v. *Gibbes* (1) and *Coventry* v. *Higgins* (2) have been cited to me, on which a general rule has been laid down in Theobald on Wills, 7th ed. p. 190, to the effect that, if the time for payment of a legacy arrives in the testator's lifetime, interest runs from his death. Now *Pickwick* v. *Gibbes* (1) was not a simple case of a gift payable at a certain date, but a case in which the testator directed his trustees to raise after the death of his wife the sum of 10,000*l.* for his nephew and to invest it and apply the income towards his maintenance. The wife predeceased the testator, and the Master of the Rolls in giving judgment says: "The intention was that the legatee was to have maintenance from the wife's death; and the wife having predeceased the testator, interest for his maintenance became payable from the testator's death." So that he founded his decision on the particular nature of the gift and the direction for maintenance. *Coventry* v. *Higgins* (2) is a very unsatisfactory case because it is so shortly reported. There there was a specific fund severed from the residue and bequeathed on trust to invest and apply the income for the maintenance of the three children of the testator—two sons and a daughter—and one third of the capital was to be paid to each of them on their respectively attaining twenty-one, and the testator directed that all legacies given by his will should be paid three months after his death. It happened that both the sons attained twenty-one in the testator's lifetime, and the question was whether their legacies were payable at his death or three months afterwards. The Vice-Chancellor held that the legacies became payable at the testator's death and carried interest from that time; but there is nothing in the report to shew what the effect of the decision was, whether the residue had to bear the interest or whether the interest was payable out of the specific fund, and it is observable that in this case too there

(1) 1 Beav. 271, 273.

(2) 14 Sim. 30.

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was a direction for maintenance. There is a criticism on these two cases in Jarman on Wills, 6th ed. vol. ii. p. 1110, which points out the anomaly that results from holding that, where a legacy is payable on an event which happens in the testator's lifetime, the legacy becomes payable immediately at the death of the testator and carries interest from that time. I think the criticism is well founded and I doubt whether any such general rule can be deduced from these two cases as is stated in Theobald on Wills. At any rate in a case like the present, where legacies are given to all the children as and when they respectively attain the age of twenty-three years, it seems to me absurd that a child who attains that age in the lifetime of the testator should, on the death of the testator, be entitled to payment of his legacy earlier than he would otherwise have received it when the real object of the testator was to postpone the payment of the legacy beyond the time at which he would in the usual course have received payment. This appears to me just one of those cases in which the words though positive in form are in reality negative in substance, and should have effect given to them accordingly. I hold therefore that in this case interest did not become payable on these legacies until one year from the death of the testator. The rate of interest will of course be 4 per cent. per annum.

Solicitors: *Bell, Brodrick & Gray, for W. H. Cobb & Son, York; Patersons, Snow & Co., for Wallace Gill & Son, Knaresborough.*

H. L. F.

In re CONSOLIDATED NICKEL MINES, LIMITED.

SARGANT J.

1914

April 3.

[00295 of 1910.]

Company — Directors — Retirement at Ordinary Meeting — Failure to hold Meeting—Remuneration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 49.

Articles of association of a company provided that general meetings should be held once in every year at such time and place as might be prescribed by the directors; that at the ordinary meeting in 1906 all the directors should "retire from office"; and that the directors should be remunerated at a certain rate per annum. Sect. 49 of the Companies Act, 1862 (which was then in force), provided that a general meeting should be held once in every year. No general meeting was held or called in the year 1906 or 1907, but the directors continued to act as such:—

Held, that the directors vacated office on December 31, 1906 (being the last day on which a general meeting for that year could have been held), and were not thereafter entitled to any remuneration until they were re-elected.

In re Great Northern Salt and Chemical Works (1890) 44 Ch. D. 472 distinguished.

On February 12, 1906, the directors passed a resolution that they should not accept any fees for their services rendered thereafter; but on January 17, 1907, they passed another resolution that from that date onwards the directors should be entitled to their fees:—

Held, that a director appointed after January 17, 1907, was entitled to remuneration under the articles.

In 1905 the company agreed to sell all its undertaking and assets to another company, the consideration being fully-paid shares in a third company and the payment by the purchasing company to the selling company of the latter's debts up to 25,000*l*. These shares were allotted to the selling company, which gave a charge on them to the purchasing company to secure repayment of what had been paid by it in discharging the debts of the selling company beyond 25,000*l*. :—

Held, that the fact that after the sale the directors' duties were diminished did not disentitle them to receive the same remuneration in the future.

The Consolidated Nickel Mines, Limited, was, on June 25, 1903, incorporated under the Companies Acts, 1862 to 1900, as a company limited by shares. Shortly after its incorporation C. Steel and others were, in pursuance of the articles of association, appointed the first directors of the company. The articles of association provided as follows:—

"62. General meetings shall be held once in every year, at such time and place in England or in France as may be prescribed by the directors . . . ."

"91. The directors, other than the managing director or directors, shall be paid out of the funds of the company, by way of remuneration for their services, at the rate of 250*l.* per annum each, the chairman at the rate of 100*l.* additional per annum, and the deputy chairman at the rate of 50*l.* additional per annum, payable quarterly, and (except in the case of a managing director) a share in the profits."

"97. The directors may, at any time, appoint any persons to be directors, provided that the number of directors shall not exceed nine in the whole."

"101. At the ordinary meeting in 1906 all the directors, and at the ordinary meeting in every subsequent year one-third of all the directors for the time being respectively, or if their number is not a multiple of three, then the number nearest to one-third, but not exceeding one-third, shall retire from office. A retiring director shall retain office until the dissolution of the meeting at which his successor is elected."

"104. The company shall, at the meeting at which any directors retire in manner aforesaid, fill up the vacated office of each director by electing a person thereto, and without notice in that behalf may fill up any other vacancies, unless the meeting determine not to fill up such vacancies."

"106. If at any meeting at which an election of directors ought to take place the places of the retiring directors, or some of them, are not filled up, the retiring directors, or such of them as have not had their places filled up, shall, if duly qualified, be deemed to have been re-elected, unless the meeting determine not to fill up such vacancies."

E. Phillips was appointed a director on August 14, 1905, and resigned his office on May 26, 1908.

By an agreement dated August 18, 1905, the company agreed to sell all its undertaking and assets to the Australasian Share Trust, Limited, the consideration being 50,000*l.* in fully-paid shares of an intended company, afterwards formed in New South Wales, called the Nickel Mines and Smelting Company, Limited, and payment of the selling company's debts up to 25,000*l.* The purchasing company sold what it had bought to the Nickel Mines and Smelting Company, shares in which for 50,000*l.* were allotted to the selling company, which gave a charge on the shares to the Australasian Share Trust to secure repayment of what had been paid by it in discharging the debts of the selling company beyond 25,000*l.*

On February 12, 1906, the directors passed a resolution that they should not accept any fees for their services rendered thereafter, but on January 16, 1907, they passed another resolution, that from that date onwards the directors should be entitled to their fees.

No general meeting of the company was held or called in 1906 or in 1907, but Steel and Phillips continued to act as directors.

J. Conchie was appointed a director at a board meeting on July 31, 1908.

Steel was re-elected a director at a general meeting of the company on August 31, 1908, and Conchie was re-elected at the same meeting.

In December, 1909, an extraordinary general meeting was held to pass a resolution for voluntary winding up, but the resolution was not passed.

In October, 1910, an order was made for the winding up of the company by the Court.

Steel, Phillips, and Conchie sent in proofs for their remuneration as directors.

The liquidator rejected the proofs, wholly or in part, on the following grounds:—(1.) That as from February 12, 1906, when the resolution as to not accepting fees was passed, no fees were payable to the directors, even after the rescinding resolution of January 16, 1907, had been passed; (2.) that when the undertaking and assets had been sold in 1905, there was nothing more to be done for which the services of the directors were required, and that they had failed in what, he said, was then their duty, namely, to take immediate steps to have the company wound up and a liquidator appointed; and (3.) that Steel and Phillips should have retired under article 101 in 1906, and that it was their own fault that no general meeting was called in that year or in 1907.

Steel, Phillips, and Conchie took out a summons in the winding-up against the liquidator for an order on him to admit the applicants as creditors for the amounts stated in their proofs.

H. E. Wright, for the applicants. Conchie's claim should be admitted in full. He was not elected a director until 1908, and was not to blame because ordinary meetings were not held before he was elected.

The other objections are made against the claims of all the three directors. No claim is made by any of them in respect of the period between the passing of the resolution not to receive directors' fees and the second resolution as to fees. The second resolution rescinded the first one, and after the rescission fees were payable as before.

Then it is said that after the undertaking was sold there was nothing more for the directors to do except to take steps to wind up the company. There was certainly less to do, but there was still something, for the shares taken as consideration were subject to a charge, and in any case could not be thrown en bloc on the market. The directors, moreover, took the view of the shareholders as to winding up the company and found that they were opposed to that step being taken. Even when directors are appointed receivers and managers of the company's assets and business in a debenture-holders' action, and are remunerated as such, they are still entitled to their separate remuneration as directors: *In re South Western of Venezuela (Barquisimeto) Ry. Co.* (1)

The third objection only affects Steel and Phillips. The fact that they were directed to retire at the annual meeting in 1906 did not vacate their office in default of an annual meeting being held in that year. The article as to the directors retiring is merely directory, as an article in Table A to the Companies Act, 1862, was held to be in *In re Great Northern Salt and Chemical Works.* (2)

[SARGANT J. referred to *Park* v. *Lawton.* (3)]

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(1) [1902] 1 Ch. 701.

(2) 44 Ch. D. 472.

(3) [1911] 1 K. B. 588.

Jenkins, K.C., and *S. R. Earle*, for the liquidator. Sect. 49 of the Companies Act, 1862, required an ordinary meeting to be held once at least in every year. The directors failed to perform their statutory duty in this respect, and cannot rely on the fact that no meeting was called in 1906. As from December 31, 1906, Steel and Phillips vacated office and were not entitled to any remuneration until they were re-elected as directors. Steel was subsequently re-elected, but Phillips never was.

After the directors had passed their resolution of February 12, 1906, they were not entitled to any remuneration unless it was given to them by the company, and their right to it was not restored by the resolution of January 16, 1907. This objection applies to the claims of all three directors.

After the agreement of August 18, 1905, there was nothing more for the directors to do, and they ought to have taken steps to have the company wound up at once. They are not entitled to remuneration after that date. [They also referred to Buckley on Companies, 9th ed. p. 643.]

H. E. Wright, in reply.

SARGANT J. Objections have been taken in this case by the liquidator to admitting the claims of Steel, Phillips, and Conchie to prove in the winding up of the company for remuneration as directors. Dealing first with Conchie's case, the first of the objections to his claim is common to the claims of all the three applicants. Before Conchie was appointed, on February 12, 1906, the directors passed a resolution that they should not accept any fees for their services rendered thereafter; but at another meeting, held on January 16, 1907, the directors passed another resolution that from that date onwards the directors should be entitled to their fees, or in other words, the former resolution was rescinded by the latter. No fees for the interval between the two resolutions were received or are now claimed by the directors. In my opinion the former resolution possessed no force after the rescinding resolution was passed and does not constitute a valid objection to the claim for subsequent fees.

The next objection, which is more important, is that by an agreement of August 18, 1905, the company agreed to sell to another company all its undertaking and assets for 50,000*l.* in fully-paid shares of an intended company, that after that it was the directors' duty to take steps to wind up their company and have a liquidator appointed, and that after the sale there was nothing more to be done for which the services of the directors were required, and therefore they were not entitled to any further remuneration. I am unable to take that view. After the sale the directors' duties diminished, but they had still something to do. The shares received as the purchase consideration were charged to the purchasing company as security for certain sums paid by that company. Moreover, both the creditors and the shareholders knew of the position of the affairs of the company and were willing that the directors should still remain in office and that the company should not be wound up. They might have asked that the directors' remuneration should be diminished, but they did not do so. The present case is stronger in favour of the directors than that of *In re South Western of Venezuela* (*Barquisimeto*) *Ry. Co.* (1), on which the applicants relied. That objection also fails, with the result that Conchie is entitled to the whole of the remuneration claimed by him.

As to the two other directors, Steel and Phillips, there is another objection. By clause 62 of the articles of association and by statute (s. 49 of the Companies Act, 1862) the directors were bound to summon a general meeting of the company once in every calendar year, and article 101 provided that "At the ordinary meeting in 1906 all the directors . . . . shall retire from office." No ordinary meeting was held or called in 1906 or 1907, and the liquidator's contention is that all the directors vacated office on December 31, 1906, which was the last day on which a meeting of the company for that year could have been held. That contention appears to me to be well founded.

A director on his appointment does not ordinarily step into an office which is perpetual unless terminated by some act, but into an office the holding of which is limited by the terms of the articles. The meaning of article 101 is that the holding of the office of director was only to last until the end of 1906, or until

(1) [1902] 1 Ch. 701.

SARGANT J.
1914
CONSOLIDATED NICKEL MINES, LIMITED, *In re.*

the earlier date on which the ordinary meeting for that year was held. *In re Great Northern Salt and Chemical Works* (1) is merely a decision as to the construction to be placed on clause 62 of Table A to the Act of 1862. Moreover, article 106 in the present case shews that prima facie a retiring director vacated office, and is against the applicants' contention. The duty of the directors was to call a meeting in 1906 and 1907, and they cannot take advantage of their own default in that respect and say that they still remain directors. *Park* v. *Lawton* (2) is to some extent in point. There it was decided that the fact that no general meeting had been held in a year was no defence to a charge of not sending in certain returns required to be made within a certain time after the first or only general meeting in the year. Steel and Phillips are therefore not entitled to any remuneration for the period between December 31, 1906, and August 30, 1908, when Steel was again a director.

Solicitors: *Romer & Skan; H. J. Mannings.*

(1) 44 Ch. D. 472.

(2) [1911] 1 K. B. 588.

F. E.

WARRING-
TON J.

1914

March 12.

In re D'EPINOIX'S SETTLEMENT.

D'EPINOIX *v.* FETTES.

[1913 D. 832.]

Trustee and Cestuis que Trust—Inquiry as to Continuing Investments—Discretion of Trustees—Interference by Court on Originating Summons—Rules of the Supreme Court, 1883, *Order* LV., *rr.* 3, 4, 12.

On an originating summons taken out under Order LV., r. 3, by a beneficiary under a settlement the Court will in a proper case direct an inquiry whether it is for the benefit of the persons interested that a particular authorized investment should be continued or called in, notwithstanding that the trustees claim to exercise their own discretion in the matter without the interference of the Court.

Observations on the propriety of the investment of trust funds on the security of an underlease.

ADJOURNED SUMMONS.

This was an originating summons taken out by the tenant for life under an indenture of settlement against the trustees and infant remaindermen asking (inter alia) for (1.) an inquiry whether a certain mortgage, dated January 20, 1913, was a proper investment of the trust funds and whether it was for the benefit of the persons interested under the settlement that the said investment should be continued or called in; (2.) a similar inquiry relating to six statutory charges for 300*l.* each; and (4.) if and so far as might be necessary execution of the trusts of the said settlement.

By an indenture of settlement, dated February 21, 1912, and made between the plaintiff of the first part, her husband of the second part, and the defendants John Fettes, solicitor, and Rowland Walter Cash, architect (the trustees), of the third part (being a settlement made on the marriage of the plaintiff under the Infant Settlements Act, 1855), the reversionary interest of the plaintiff under the will of a testator was assigned to the trustees upon trust, when the same should fall into possession, to get in and receive or obtain transfer of the said premises, or the investments representing the same, and either permit them to remain as invested or, with the consent of the plaintiff during her life and after her death at the discretion of the trustees, sell and convert the same into money, and with the like consent or at the like discretion to invest the money arising therefrom in manner thereinafter directed, with power at the like request or discretion to vary such investments for others of a like nature, and to stand possessed of the trust funds and investments representing the same in trust to pay the income to the plaintiff during her life for her separate use without power of anticipation and after her death upon trusts therein declared in favour of her issue. A very wide power of investment was thereby conferred on the trustees, including power to invest "upon freehold, copyhold, leasehold, or chattel real securities in Great Britain, but not in Ireland, including first charges registered under the Land Transfer Acts, 1875 and 1897, on freehold or leasehold hereditaments in England, such leaseholds or chattels real not having less than fifty years to run at the date of such investment being made."

The reversionary interest had fallen into possession and the total trust funds subject to the settlement amounted in value to 16,000*l.* or a little more.

The trustees had advanced 4160*l.*, part of the trust funds, upon an indenture of mortgage, dated January 20, 1913, referred to in the first paragraph of the summons. The property comprised in this mortgage consisted of two leasehold shops and twelve leasehold messuages situate at Winchmore Hill in the county of Middlesex and five leasehold messuages situate at Sydenham in the county of Surrey, subject to varying ground rents. The two shops were let at yearly rents of 60*l.*, and the other messuages were let at rents varying from 26*l.* to 42*l.* per annum.

The trustees had also invested a sum of 1800*l.*, further part of the trust funds, on the security of six statutory charges referred to in the second paragraph of the summons, for 300*l.* each, registered at the Land Registry under the Land Transfer Acts, 1875 and 1897, created by the underlessee of six leasehold messuages situate at Eltham in the county of Kent, which were subject to ground rents and were let at rents varying from 38*l.* to 40*l.* per annum.

Valuations had been made at the time of each investment on behalf of the trustees and in each case the trustees had advanced two-thirds of the amount of the valuation, and, according to a recent valuation made at the instance of the tenant for life, the property comprised in the mortgage for the larger amount was now of a considerably less value than that attributed to it at the time of the investment.

Each investment had been made with the consent of the tenant for life, and the summons was not based on any suggestion that the trustees had been guilty of breach of trust; and under these circumstances the trustees opposed the inquiries on the ground that the matter was entirely one for the discretion of the trustees, and that it was contrary to the settled practice of the Court to interfere with the honest exercise of their discretion by trustees who were willing to exercise it.

Clauson, K.C., and *Dighton Pollock*, for the plaintiff. We do not suggest that the trustees were guilty of breach of trust in making these investments, but the evidence shews a sufficient case for the inquiries claimed. An investment on the security of an underlease is not a prudent one for trustees to hold: *In re Lloyds Bank and Lillington's Contract.* (1)

H. Terrell, K.C., and *F. H. L. Errington*, for the trustees. The question is one entirely for the discretion of the trustees, and it is the settled practice of the Court not to interfere with the honest exercise of their discretion by trustees who are willing to exercise it.

P. F. Stokes, for the infant remaindermen.

WARRINGTON J. This is an application under Order LV., r. 3, by the tenant for life under an indenture of settlement asking that inquiries may be made whether certain mortgage securities taken by the trustees are proper to be continued as investments of the trust funds or whether they ought to be called in.

The summons also asks that, if and so far as may be necessary, the trusts of the settlement may be executed. [His Lordship read the material parts of the settlement and continued:] The investments which are now in question amount to 5960*l.* in all, a very large proportion of the total trust funds. Of this sum 4160*l.* is invested on the security of two shops and a large number of suburban houses newly built. The shops at the time when the valuation for the purposes of the investment was made were let at 60*l.* each; the houses were let, some at 42*l.* each, a large number at 26*l.* each, and a number of others at 40*l.* each. The property therefore consisted of the small suburban houses with which we are fairly familiar. The particular properties in question were valued by well-known valuers as of the value of a named sum and as offering a sufficient security for the investment of a named sum. That sum in every case was two-thirds of the amount which the valuers thought was the value of the property. They were asked to advise on behalf of the trustees and knew therefore that they were advising on behalf of trustees.

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(1) [1912] 1 Ch. 601.

Recently the plaintiff has caused the same property to be valued by a gentleman of very great experience in this kind of property, and he values these shops and houses at 5200*l.* and considers them as sufficient security for 3360*l.* only. I do not wish in the least to prejudice the answer to the inquiry which I propose to direct, but I should have thought that when such a difference of opinion as that was brought to the attention of the trustees they would have said at once, " This is not a security which as trustees we ought to retain on behalf of the trust estate." I do not say what the result of the inquiry is to be. I do not wish to be misunderstood, but I should have thought that trustees whose only interest it is to do what is most prudent on behalf of their cestui que trust would, when the matter was drawn to their attention, have said " in the face of that doubt as to the value of the security we will call it in." However, they did not take that step.

With regard to the sum of 1800*l.*, that again is invested on a number of small suburban houses of the same character situate at Eltham let, some at 38*l.* and some at 40*l.* per annum. These properties too were valued at a sum which would allow the investment of 1800*l.*, that being about two-thirds of the total value set on them. These properties, moreover, are held by underlease. I must not be understood to say that a power to invest on leasehold securities would not authorize trustees in any case to advance money on the security of an underlease, but I do say that when trustees are proposing to advance on such security it is a question for their serious consideration whether it is prudent to advance trust money on security of such a character that they are liable to be embarrassed and possibly exposed to loss by the acts or defaults of the original lessee, a person over whom they have no control. However the trustees in the present case made the investment, and it is not suggested that it was a breach of trust. But in the case of this investment also, looking to the nature of the property and the tenure on which it is held, I think that there is a case for inquiry. So far as the question of jurisdiction is concerned, I certainly have jurisdiction to direct that the trusts of the settlement be carried into execution, and if I did that, I should certainly have jurisdiction to direct these inquiries, and since Order LV. of the Rules of the Supreme Court, 1883, has come into operation the Court in my opinion has jurisdiction, without directing the trusts to be carried into execution, to direct particular inquiries or things to be made or done in the administration of the trusts. Acting on this view I think it right to direct an inquiry in the present case whether it is for the benefit of the persons interested under the settlement that the securities mentioned in paragraphs 1 and 2 of the summons, or any and which of them, ought to be continued, or whether any and which of them should be called in. The rest of the summons will stand over with liberty to apply. I desire to add that, in my opinion, the summons never did charge, in terms or otherwise, any breach of trust against the trustees, and I think a great deal of the trouble has been caused by the undue sensitiveness of the trustees to what they seem to have thought was a charge of misconduct against them.

Solicitors: *Crosse & Sons; Cooper, Bake, Roche & Fettes.*

A. C.

BARRON *v.* POTTER.

POTTER *v.* BERRY.

[1914 B. 638.]

[1914 P. 92.]

WARRINGTON J.
1914
March 13.

Company — Additional Directors — Appointment by Board of Directors — Informal Meeting—Unable or unwilling to act—Power of Company in General Meeting—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *Table A*, *cl.* 85.

A board meeting of directors can be held under informal circumstances, but the casual meeting of two directors even at the office of the company cannot be treated as a board meeting at the option of one against the will and intention of the other, and it makes no difference that a notice convening a board meeting has been sent by the one to the other if such notice has not in fact been received by the other.

Smith v. *Paringa Mines* [1906] 2 Ch. 193 distinguished.

Where the articles of association of a company incorporated under the Companies (Consolidation) Act, 1908, give to the board of directors the power of appointing an additional director, and owing to differences between the directors no board meeting can be held for the purpose, the company retains power to appoint additional directors in general meeting.

Observations of Cotton and Fry L.JJ. in *Isle of Wight Ry. Co.* v. *Tahourdin* (1883) 25 Ch. D. 320, 332, 335, followed.

Blair Open Hearth Furnace Co. v. *Reigart* (1913) 108 L. T. 665 distinguished.

Cross-Motions.

The British Seagumite Company, Limited, was incorporated under the Companies (Consolidation) Act, 1908, as a private company in January, 1912. Article 21 of the articles of association provided that the number of directors should be not less than two or more than ten. Article 26 provided that the quorum of directors for transacting business should, unless otherwise fixed by the directors, be two. The articles also incorporated clause 85 of Table A, which provides: " The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director." The articles also incorporated clause 87 of Table A, which gives power to the directors to regulate their business as they think fit and gives the chairman a second or casting vote in case of equality.

In the commencement of the year 1914 there were two directors only, W. J. Potter, the chairman and managing director, and Canon Barron. The conduct of the company's business was at a standstill as Canon Barron refused to attend any board meeting with Mr. Potter. On February 9 Canon Barron (pursuant to the provisions of s. 66 of the Companies (Consolidation) Act, 1908) sent out a notice convening an extraordinary general meeting for February 24, at 28, Fleet Street, the registered office of the company, for the purpose of passing a resolution terminating the appointment of Mr. Potter as managing director of the company, and a resolution that one Charles Berry be appointed an additional director.

On February 21 Mr. Potter sent through the post to Canon Barron a notice requesting him to attend a board meeting at the company's office on February 24 at 2.40 P.M. This notice, however, was not in fact received by Canon Barron, who lived in the country, until a later date after his return from London.

Canon Barron arrived by train at Paddington Station on February 23, and on his arrival was met on the platform by Mr. Potter, who there purported under the circumstances presently stated to hold a board meeting and by his casting vote to appoint three persons as additional directors of the company. Canon Barron came to the company's office on February 24 with the intention of attending not a board meeting but the extraordinary meeting of the company. Mr. Potter met him in the office before the meeting and under the circumstances presently stated again proposed the appointment of additional directors. Canon Barron disregarded the proposal, whereupon Mr. Potter purported to vote and declared them elected.

The extraordinary meeting of the company was then held, at which the first resolution was put to the meeting and carried on a show of hands. Mr. Potter then demanded a poll, stating that he would fix a place and time. In default of the chairman, Canon Barron put the second resolution to the meeting, which, together with an amendment adding two other persons as additional directors, he declared to be carried. Mr. Potter, however, ruled it to be illegal, as the power lay with the directors and not with the company.

On February 24, 1914, Canon Barron issued his writ (to which the company was afterwards added as co-plaintiff) against Mr. Potter and the persons purporting to have been appointed as additional directors at the alleged board meetings for an injunction to restrain the defendants, other than Mr. Potter, from acting as directors and for a declaration that they had not been validly appointed as directors; and on March 6, 1914, Mr. Potter issued his writ in the cross-action, claiming a declaration that the appointment of the additional directors at the general meeting was ultra vires and invalid, and an injunction; and the respective plaintiffs now moved for interlocutory injunctions.

The questions raised by each motion were the same, namely, (1.) whether what had taken place between Mr. Potter and Canon Barron amounted to a valid appointment by the board of the additional directors proposed by Mr. Potter; and (2.) if not, then whether the resolution of the company in general meeting was a valid appointment of the persons named in the resolution.

Mr. Potter's evidence on the first point was that owing to the refusal of Canon Barron to attend any board meeting the position of the affairs of the company was becoming so serious that he was advised in the interests of the company to meet Canon Barron wherever he could be found and to use his casting vote as chairman in case Canon Barron should refuse to agree to the appointment of additional directors. Accordingly on February 23 he met the train at Paddington by which he expected Canon Barron to arrive, and seeing him alight from it walked by his side along the platform and said to him, "I want to see you, please." Canon Barron replied, "I have nothing to say to you." Mr. Potter then said, "I formally propose that we add the Reverend Charles Herbert, Mr. William George Walter Barnard, and Mr. John Tolehurst Musgrave as additional directors to the board of the British Seagumite Company, Limited. Do you agree or object?" Canon Barron replied, "I object and I object to say anything to you at all." Mr.

Potter then said, "In my capacity as chairman I give my casting vote in their favour and declare them duly elected." He continued to walk with Canon Barron a few steps and then said, "That is all I want to say; thank you. Good day."

According to Canon Barron's evidence, on his arrival at Paddington Station he engaged a porter to carry his luggage to a taxicab. On the way to it he saw Mr. Potter coming towards him, who said, "I want a word with you." He replied, "I shall hold no communication with you. I shall have nothing to do with you." Mr. Potter then laid his hand upon Canon Barron's arm and said, "I propose Mr. . . . . as a director." Canon Barron did not catch the name and turned his back and continued towards his taxicab. He then heard Mr. Potter hurriedly say, "Have you any amendment? Then I give my casting vote."

As to the alleged board meeting on February 24, Mr. Potter stated that Canon Barron arrived at the office of the company with the object of attending the extraordinary general meeting called by him. Mr. Potter thereupon proposed to Canon Barron that Mrs. Clara Rose Potter, Miss Florence Millicent Hewitt, and Mr. Frank Burnett should be appointed additional directors of the company, proposing each name separately. Canon Barron disregarded the proposals and refused to vote thereon, whereupon Mr. Potter voted in favour of them and declared the persons named to be duly elected directors.

According to Canon Barron's evidence, he attended at the registered office of the company at 3 o'clock P.M. to attend the extraordinary general meeting, and as he entered the inner room where the meeting was to be held Mr. Potter came after him and said, "I propose Mrs. Clara Rose Potter and (mentioning another name) as directors. Have you any amendments?" Canon Barron answered laughingly, "Yes, I have plenty of amendments which we shall discuss." Here Mr. Potter interrupted him and said, "Then I give my casting vote; they are elected."

H. Terrell, K.C., and *Sheldon*, for the motion in Barron's action. First, there was no valid appointment of the additional directors at any board meeting. The persons attending a board meeting must attend as directors and vote as directors. These requirements were not satisfied by what took place either at Paddington Station or on the second occasion at the office of the company. A directors' meeting may no doubt be held informally: *Smith* v. *Paringa Mines* (1); but that case bears no resemblance to the present. Secondly, notwithstanding the delegation by the articles of the power of appointing an additional director, the company retained a concurrent power under circumstances such as existed in the present case: *Isle of Wight Ry. Co.* v. *Tahourdin.* (2) Otherwise there would be a complete deadlock, and there is nothing in *Blair Open Hearth Furnace Co.* v. *Reigart* (3), *Automatic Self-cleansing Filter Syndicate Co.* v. *Cuninghame* (4), and *Salmon* v. *Quin & Axtens* (5) which conflicts with this view. *Automatic Self-cleansing Filter Syndicate Co.* v. *Cuninghame* (4) was explained by Neville J. in *Marshall's Valve Gear Co.* v. *Manning, Wardle & Co.* (6)

Clauson, K.C., and *H. E. Wright*, for the respondents. As to the first point we do not rely on the meeting at Paddington Station, but on the subsequent occasion on February 24 there was every ingredient of a valid board meeting. Notice summoning the meeting had been duly sent through the post by Mr. Potter even if it had not then been received by Canon Barron, and the place of actual meeting was at the registered office of the company. The meeting was no more informal than in *Smith* v. *Paringa Mines* (1), and it was not open to Canon Barron to nullify it by his conduct. Secondly, the resolution carried at the general meeting was in any case invalid. The express power of appointing an additional director conferred by the articles on the directors excludes the existence of a concurrent power in the company: *Blair Open Hearth Furnace Co.* v. *Reigart* (3); *Automatic Self-cleansing Filter Syndicate Co.* v. *Cuninghame* (4); *Gramophone and Typewriter* v. *Stanley.* (7) The case of *Isle of Wight Ry. Co.* v. *Tahourdin* (1), which is relied on against us, is inapplicable, since that was a case under the Companies Clauses Consolidation Act, 1845, which contains an express provision making the exercise of the directors' powers subject to the control of a general meeting, and it was distinguished on that ground in *Automatic Self-cleansing Filter Syndicate Co.* v. *Cuninghame* (2) and in *Salmon* v. *Quin & Axtens.* (3)

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(1) [1906] 2 Ch. 193.

(2) 25 Ch. D. 320, 332, 335, per Cotton and Fry L.JJ.

(3) 108 L. T. 665.

(4) [1906] 2 Ch. 34.

(5) [1909] 1 Ch. 311; affirmed in H. L. sub nom. *Quin & Axtens* v. *Salmon* [1909] A. C. 442.

(6) [1909] 1 Ch. 267.

(7) [1908] 2 K. B. 89, 98, per Fletcher Moulton L.J.

H. Terrell, K.C., was called on to reply only as to the alleged board meeting on February 24. What took place between Mr. Potter and Canon Barron on that occasion was not business transacted at a board meeting. Canon Barron attended at the office of the company for the purposes of the extraordinary general meeting only and without any intention of attending a board meeting with Mr. Potter. One director cannot force another to hold a board meeting against his will. The facts in *Smith* v. *Paringa Mines* (4) were totally different.

WARRINGTON J. In the present case there are two cross-motions, the objects of which are the same, though the position of the parties is reversed. The question is whether certain additional directors appointed at a general meeting of the company were validly appointed or whether certain additional directors were validly appointed at a directors' meeting, in which case the resolution of the company in general meeting would be invalid. [His Lordship stated the facts and continued:] Mr. Potter originally insisted that what took place on the platform of Paddington Station was a directors' meeting at which a sufficient proposal was made for the appointment of the three persons named as additional directors, and that if Canon Barron did not vote it was competent to Mr. Potter to vote and carry the resolution, or if Canon Barron did vote, then it was competent for Mr. Potter to carry it by his own casting vote. It is not, however, now contended that what took place on that occasion was a valid appointment of the additional directors, but it is contended that what took place the next day immediately before

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(1) 25 Ch. D. 320.

(2) [1906] 2 Ch. 34

(3) [1909] 1 Ch. 311.

(4) [1906] 2 Ch. 193.

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the general meeting did amount to a valid appointment. I will first refer to the articles of association under which the company is substantially governed by Table A, clause 85 of which provides that "the directors shall have power at any time, and from time to time, to appoint a person as additional director . . . . ," and clause 87 gives power to the directors to regulate their business as they think fit and gives the chairman a second or casting vote in case of equality. Another article provides that the quorum of directors, unless otherwise fixed by the directors, shall be two. [His Lordship then referred to what took place between Canon Barron and Mr. Potter immediately before the general meeting on February 24 and said that there was no substantial difference between the accounts which they gave respectively, and continued :] What then took place is said to have been a directors' meeting at which a valid appointment was made of the three additional directors proposed by Mr. Potter. The answer, in my opinion, is that there was no directors' meeting at all for the reason that Canon Barron to the knowledge of Mr. Potter insisted all along that he would not attend any directors' meeting with Mr. Potter or discuss the affairs of the company with him, and it is not enough that one of two directors should say "This is a directors' meeting" while the other says it is not. Of course if directors are willing to hold a meeting they may do so under any circumstances, but one of them cannot be made to attend the board or to convert a casual meeting into a board meeting, and in the present case I do not see how the meeting in question can be treated as a board meeting. In my opinion therefore the true conclusion is that there was no board meeting, but that Canon Barron came with the deliberate intention of not attending a board meeting. If he had received the notice sent to him by Mr. Potter summoning him to a board meeting different considerations might have arisen, but he had not received it and came with the fixed intention of not attending any such meeting. There was therefore no board meeting at which Canon Barron was present. Mr. Potter was alone present, so that there was no quorum, and I must hold that the three additional directors named by him were not validly appointed.

The question then arises, Was the resolution passed at the general meeting of the company a valid appointment? The argument against the validity of the appointment is that the articles of association of the company gave to the board of directors the power of appointing additional directors, that the company has accordingly surrendered the power, and that the directors alone can exercise it. It is true that the general point was so decided by Eve J. in *Blair Open Hearth Furnace Co.* v. *Reigart* (1), and I am not concerned to say that in ordinary cases where there is a board ready and willing to act it would be competent for the company to override the power conferred on the directors by the articles except by way of special resolution for the purpose of altering the articles. But the case which I have to deal with is a different one. For practical purposes there is no board of directors at all. The only directors are two persons, one of whom refuses to act with the other, and the question is, What is to be done under these circumstances? On this point I think that I can usefully refer to the judgment of the Court of Appeal in *Isle of Wight Ry. Co.* v. *Tahourdin* (2), not for the sake of the decision, which depended on the fact that it was a case under the Companies Clauses Consolidation Act, 1845, but for the sake of the observations of Cotton and Fry L.JJ. upon the effect of a deadlock such as arose in the present case. Cotton L.J. says (3): "Then it is said that there is no power in the meeting of shareholders to elect new directors, for that under the 89th section the power would be in the remaining directors. The remaining directors would no doubt have that power if there was a quorum left. But suppose the meeting were to remove so many directors that a quorum was not left, what then follows? It has been argued that in that case, there being no board which could act, there would be no power of filling up the board so as to enable it to work. In my opinion that is utterly wrong. A power is given by the 89th section to the remaining directors 'if they think proper so to do' to elect persons to fill up the vacancies. I do not see how it is possible for a non-existent body to think proper to fill up vacancies. In such a case a general meeting duly summoned for the purpose must have power to elect a new board so as not to let the business of the company be at a deadlock." Fry L.J. says this (1): "Then with regard to the objection that a general meeting cannot elect directors to fill up vacancies, it appears to me that a general meeting would at any rate have that power in the event of all the directors being removed. In my judgment it is quite impossible to read the 89th section as the only section relating to the filling up of vacancies in the office of directors. That applies only where there are remaining directors, and those remaining directors think proper to exercise their power. That does not, in my judgment, deprive the general meeting of the power to elect directors, where there are no directors, or where the directors do not think fit to exercise their powers." Those observations express a principle which seems to me to be as applicable to the case of a limited company incorporated under the Companies (Consolidation) Act, 1908, as to a case falling under the Companies Clauses Consolidation Act, 1845, and moreover to be a principle founded on plain common sense. If directors having certain powers are unable or unwilling to exercise them—are in fact a non-existent body for the purpose—there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling to appoint additional directors under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment. The company has passed a resolution for that purpose, and though a poll has been demanded no date or place has yet been fixed for taking it. The result therefore is that I must grant an injunction on the motion in Canon Barron's action and refuse the motion in Mr. Potter's action.

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(1) 108 L. T. 665.

(2) 25 Ch. D. 320.

(3) 25 Ch. D. 332.

Solicitors: *Bartlett & Gluckstein; A. J. Greenop & Co.*

(1) 25 Ch. D. 335.

A. C.

SARGANT J.

1913

Dec. 16, 17.

ELLIS *v.* ALLEN.

[1913 E. 1024.]

Practice—Admissions "either on the pleadings or otherwise"—Admissions by Letter—Rules of the Supreme Court, 1883, *Order* XXXII., *rr.* 1, 4, 6.

The words "or otherwise" in r. 6 of Order XXXII. are not confined to admissions made under r. 1 or r. 4 of the same Order, but are of general application, and justify the making or giving of an immediate order or judgment, when an admission is made by letter of facts which shew that the defendant has no defence to the action.

By a lease dated August 23, 1910, the plaintiffs demised a piece of land and the house thereon to C. E. Allen for a term of seven years from September 29, 1910, at a yearly rent of 400*l.* The lease contained a covenant by Allen that he would not "assign, transfer, underlet, or part with the possession of the said premises, or any part thereof, without the previous consent in writing of the lessors, such consent not to be unreasonably or vexatiously withheld in the case of a responsible and respectable person"; and also a proviso that "in the event of any breach or non-performance of any of the covenants and agreements on the part of the lessee hereinbefore contained, the lessors may re-enter on the said demised premises."

By an agreement dated August 27, 1913, Allen agreed to let the demised premises, with the furniture therein, to J. Johnston for a term of fifty-two weeks (less one day) from September 1, 1913, to August 29, 1914, at a yearly rent of 1725*l.*, and Johnston was let into possession under the agreement.

The consent of the lessors was not obtained to the sub-letting.

On September 23, 1913, the plaintiffs issued a writ of summons against Allen and Johnston, claiming (1.) a declaration that the term of years created by the lease to Allen had ceased and determined; (2.) possession of the premises thereby demised; (3.) as against Allen, mesne profits until judgment; (4.) as against Allen, damages for breach of the covenant in the lease to yield up the premises in repair.

After the writ had been served, the solicitors for Allen (whose authority to write was not repudiated) sent to the plaintiffs' solicitors a letter, dated October 1, 1913, in which they said:

"We must express the greatest surprise at the contents of your letter of yesterday's date. The position appears to be this: Our client took up the lease of this property rather over three years ago, and at once laid out nearly 3000*l.* on improvements, a list of the most important of which we enclose. He has recently let the property, furnished, to a tenant who is a respectable and responsible person, whom your clients would have been bound to accept if their consent had been applied for. Our client's omission to apply for your clients' consent was purely a mistake. The letting was arranged hurriedly, and both he and his agents did not consider that a licence was required in the case of a short letting of the property furnished, and, as you are aware, such lettings are often excepted in this form of covenant. Our client regrets the omission, and is quite willing to pay the costs your clients have incurred, and also to pay for a short deed of waiver. Are we to understand that your clients, notwithstanding these facts, still claim to forfeit our client's lease, to cause him to lose all the money he has expended on the property, and subject him to an action for damages at the hands of his undertenant in a case where the breach of covenant was entirely accidental, and has caused your clients no damage whatever beyond the expenses they have incurred, and which we have offered to pay? It is necessary we should write to you fully so that, should your clients adhere to the position they have taken up, we may be able to prove to the Court, on an application for relief, that our client was willing to do everything reasonable to remedy the breach of covenant."

On October 14, 1913, the plaintiffs took out a summons for directions calling on the defendants to shew cause why an order for directions should not be made (inter alia) that the defendant Allen "having admitted that he has committed a breach of the covenant contained in" the lease of 1910 "against the assignment, transfer, underletting, or parting with possession of the premises thereby demised or any part thereof without the previous consent in writing of the lessors, declare that the term of years created by the said lease has ceased and determined and that the plaintiffs are entitled as against the said defendant to re-enter on the said premises."

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ALLEN.

Romer, K.C., and *Rolt*, for the plaintiffs. The defendant has committed a breach of covenant creating a forfeiture against which he has no ground for relief, either under statute law or in equity. The letter of his solicitors contains a clear admission which entitles the plaintiff to judgment at once under Order XXXII., r. 6, which says that the admission may be "made either on the pleadings or otherwise." This admission comes within the words "or otherwise."

H. C. Bischoff, for the defendant Allen. The plaintiffs' application purports to be made under Order XXXII., r. 6, which provides that any party may at any stage of a cause, "where admissions of fact have been made, either on the pleadings or otherwise," apply for "such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties," and that thereupon such order or judgment may be given "as the Court or judge may think just." A party cannot proceed under this rule unless the admission is by a pleading, or such an admission as is actually referred to in Order XXXII. One mode of making an admission, provided for by r. 1 of that Order, is by a party giving "notice by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party," but that refers to the case set up by the other party in his pleading. Rules 2 and 3 relate to admission of documents; and rr. 4 and 5 relate to admissions of facts in the Form No. 13 in Appendix B to the Rules, after notice to admit "any specific fact or facts mentioned in such notice." The defendant's solicitors' letter is not an admission within any of these rules. The plaintiffs may rely on *In re Beeny* (1), where a defendant was ordered to pay into Court money which he had admitted to be in his hands, but the order was made there under the general jurisdiction of the Court.

[SARGANT J. The applicants' counsel there referred to Order XXXII., r. 6.]

There was no decision on the rule. In *Landergan* v. *Feast* (2) the Court of Appeal held that an order should not be made under r. 6 in an action for money lent unless there was a clear admission that the debt was due and recoverable in the action in which the admission was made. It was urged that the words "or otherwise" only referred to cases where notice had been given under r. 1 or r. 4 of the Order; and Lindley L.J. said: "That point may some day require decision, but it is unnecessary now for us to say whether that contention is right, or whether the words have a wider meaning." That question has never been decided. *Mackellar* v. *Hornsey* (1) was decided on Order XXV., r. 4. Order XXXII., r. 6, was not intended to give a back way to getting a speedy final judgment on a mere statement in a solicitor's letter.

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(1) [1894] 1 Ch. 499.

(2) (1886) 55 L. T. 42, 43.

If the rule does apply, the letter contains no such clear admission as shews that there is no defence at all to the action; it merely admits that there has been a sub-letting. *Barrow* v. *Isaacs & Son* (2) is an authority shewing that the defendant could obtain relief from forfeiture of his lease on the ground of mistake, although relief was not given in that case. It might be a sufficient mistake if the defendant shewed that he thought the covenant did not apply to a letting of the house furnished. If the application for judgment is refused, and there is a delay by the defendant pleading and his pleading shews no defence, the plaintiff may obtain an order to strike it out under Order XXV., r. 4.

Romer, K.C., in reply. The defendant has put in an eloquent plea to be allowed to deliver a frivolous and vexatious defence. Assuming that the admission is not within rr. 1 to 3 of Order XXXII., the object of r. 4 is to prevent unnecessary costs being incurred. Rule 6 is quite general in its terms and a provision which is independent of the previous rules of the Order. Forgetfulness by the lessee of the covenant is not a mistake entitling him to relief from forfeiture: *Eastern Telegraph Co.* v. *Dent.* (3) In order to succeed the lessee must shew circumstances sufficient to found an equitable claim to relief: *Greville* v. *Parker.* (4)

F. Dodd, for the defendant Johnston, took no part in the argument.

(1) (1901) 49 W. R. 301.
(2) [1891] 1 Q. B. 417.
(3) [1899] 1 Q. B. 835.
(4) [1910] A. C. 335.

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Sargant J. This is an application in an action brought by the plaintiffs against Allen, the lessee of certain property, and Johnston, the sub-tenant, practically to recover from them possession of the demised premises. By Order xxxii., r. 6, it is provided that any party may "at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties," and that upon such application such order may be made or judgment given "as the Court or judge may think just." The action is founded on a breach of covenant by the defendant Allen not to "assign, transfer, underlet, or part with the possession" of the demised premises "without the previous consent in writing of the lessors, such consent not to be unreasonably or vexatiously withheld in the case of a responsible and respectable person." No doubt the defendant Allen has let the property to Johnston without having applied to the plaintiffs for their consent, and the day after they had entered an appearance for Allen in the action his solicitors wrote a letter to the plaintiffs' solicitors. [His Lordship read the letter, and continued:] That letter is relied on by the plaintiffs as an admission by the defendant Allen that there has been a subletting of the property by him contrary to his covenant in the lease.

Mr. Bischoff, who urged every point that could be urged, based his argument mainly on two grounds. In the first place, he contended that the words "either on the pleadings, or otherwise," in r. 6 meant either on the pleadings or otherwise under this Order. The cases cited do not cover this point. In two of them the order made was not necessarily made under r. 6. In *Londergan* v. *Feast* (1) the Court of Appeal apparently thought that the point was a nice one, which might some day have to be decided; and it has now for the first time arisen for actual decision. I should be unduly narrowing the meaning of the rule if I did not hold that the admission in this case was within it. The object of the rule was to enable a party to

(1) 55 L. T. 42.

obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. I do not think r. 6 should be confined as suggested. In my judgment it applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed.

The second argument put forward by Mr. Bischoff is that the letter is not an admission which shews that there can be no defence to the action, and he says that, accepting the letter as containing certain admissions by his client, that is not inconsistent with the client having a defence on the equitable ground of mistake or inadvertence. He cited *Barrow* v. *Isaacs & Son* (1), where the Court, while refusing to grant relief, seemed to think that relief might in some cases be granted on the ground of unilateral mistake. I asked Mr. Bischoff to point to any facts in the present case which would give the Court jurisdiction to grant his client relief, but he declined to shew his hand, and could not cite any case where relief had been given on the ground of forgetfulness of a covenant, or the omission to notice its exact wording. The non-production of such a case is eloquent. In granting relief non-payment of rent was at first the only ground. Then the jurisdiction was extended to cases of breach of covenant to insure against fire, and subsequently it was extended by s. 14 of the Conveyancing Act, 1881, to other cases. But it has never been extended to such a case as this.

I cannot conceive any circumstances which the defendant Allen could rely on as a defence to the action, having regard to the admissions made by the letter, and I hold that the plaintiff is entitled to judgment against him under r. 6.

I sympathize with the defendant, but can see no legal or equitable ground for helping him.

Solicitors for plaintiff: *R. S. Taylor, Son & Humbert.*
Solicitors for defendant Allen: *Laytons.*
Solicitor for defendant Johnston: *Sydney James.*

(1) [1891] 1 Q. B. 417.

F. E.

SARGANT J.

1914

Feb. 20, 23.

In re MORGAN.

VACHELL *v.* MORGAN.

[1913 M. 1742.]

Tenant for Life and Remainderman—Mines—Will directing Sale of Real Estate—Power to postpone—Direction as to Payment of Rents and Profits till Sale—Rents and Royalties under Mining Leases—Open Mines.

Testator gave his real and personal estate to a trustee upon trusts for sale and conversion and investment of the proceeds of sale, and gave one fourth part of his residuary trust fund in trust to pay the income thereof to A. during his life and after his death upon trusts in favour of his children, and gave another fourth part on similar trusts in favour of B. and her children; and the testator empowered his trustee to postpone the sale and conversion of any part of his real and personal estate for so long as he should think fit, and directed that the "rents, profits and income" of such parts of his estate as should remain unsold and unconverted should be paid to the persons to whom the income of the proceeds of such sale and conversion would be payable under his will if such sale and conversion had been actually made.

The testator's estate comprised open mines which were leased to lessees and were still unsold:—

Held, that under the terms of the will A. and B. were respectively entitled to receive the whole of the rents and royalties attributable to their respective shares, no part being retained as capital.

Testator in 1889 granted a lease of part of a mineral area and entered into negotiations with the lessees for a lease of the adjoining part. He died in March, 1912, and the trustee of his will continued the negotiations and in October, 1912, granted a lease to the same lessees of such adjoining part which was intended to be worked through the shaft sunk on the part comprised in the lease of 1889:—

Held, that the minerals comprised in the lease of October, 1912, must be treated as an open mine at the date of the testator's death.

Chaytor v. *Trotter* (1902) 87 L. T. 33 applied.

In 1883 a lease of minerals was made to lessees who worked them through a shaft sunk on other land. In 1897 the lessees surrendered this lease to the testator owing to the working becoming unprofitable, and the minerals remained unworked till the testator's death in 1912, though the testator had entered into negotiations for continuing or resuming their working. In December, 1912, the trustee of the testator's will granted a new lease of these minerals to new lessees who worked them through a shaft sunk on other land:—

Held, that these minerals must be treated as an open mine at the date of the testator's death.

ADJOURNED SUMMONS.

Thomas Watkin Wayne Morgan by his will dated August 24, 1911, appointed the plaintiff his sole trustee and executor, and devised and bequeathed to him all his real and personal estate upon trusts for sale and conversion and investment of the proceeds of such sale and conversion, and gave his residuary trust funds as to two fourth parts in trust for certain persons absolutely, and as to one other fourth part in trust to pay the income thereof to Mathew Wayne Morgan during his life and after his death upon trusts in favour of his children; and as to the other fourth part in trust to pay the income thereof to Eleanor Ann Bevan during her life without power of anticipation and after her death upon trusts in favour of her children; and the testator declared that his trustee might postpone the sale and conversion of any part of his real and personal estate and continue any investments existing at his death for so long as he should think fit without incurring any responsibility in so doing, and that the "rents, profits and income" to accrue from and after his decease of and from such part of his estate as should for the time being remain unsold and unconverted should, after payment thereout of all incidental expenses and outgoings, be paid and applied to the person or persons and in the manner to whom and in which the income of the proceeds of such sale and conversion would for the time being be payable or applicable under his will, if such sale and conversion had actually been made; and the testator declared that as regards any leasehold or real property remaining unsold his trustee should be at liberty to let or demise the same either from year to year or for any term of years at such rent and subject to such covenants and conditions as he should think fit, to accept surrenders of leases and tenancies, to expend money in repairs and improvements, and generally to manage the property according to his absolute discretion.

The testator died on March 19, 1912. The testator's estate mainly consisted of mineral property in the county of Glamorgan. At the time of his death part of the property, consisting of mines of coal, ironstone and fireclay, and part of the surface, was leased to the Great Western Colliery Company under a lease dated January 5, 1889, and made between Lewis Wayne Morgan, a brother of the testator, and the testator of the one part and the colliery company of the other part. This property belonged to the testator's brother and the testator in the proportions of eleven thirteenths to the testator's brother and two thirteenths to the testator, the testator's share amounting on an average to about 1000*l.* per annum. The property comprised in this lease is hereafter called the northern part of the northern portion of the testator's land.

The testator also owned the immediately adjoining property to the south, hereafter called the southern part of the northern portion of the testator's land; and the testator in his lifetime and the trustee of his will after his death entered into negotiations with the Great Western Colliery Company for the purpose of leasing to them the minerals under this land also, and ultimately a lease of these minerals dated October 8, 1912, was granted to the company by the trustee.

The testator also owned property, hereafter called the southern portion of the testator's land, which was at a considerable distance from the northern portion and separated therefrom by land belonging to other persons. A lease of the minerals under this property had in 1883 been granted to Messrs. Crawshay, who worked them through a shaft sunk on other land to the north belonging to them. In 1897 Messrs. Crawshay finding the working unprofitable surrendered their lease to the testator, and these minerals remained unworked till the date of his death in 1912, though the testator had entered into negotiations for continuing or resuming their working. On December 16, 1912, the trustee of his will made a lease of these minerals to the Great Western Colliery Company.

This was an originating summons taken out by the trustee of the will raising the questions (1.) whether one fourth part of the proportion of the rents and royalties reserved by the lease dated January 5, 1889, payable to the testator or his estate ought to be paid to Mathew Wayne Morgan during his life, and whether one other fourth part ought to be paid to Eleanor Ann Bevan during her life, or whether the whole or any or what portions of such one fourth parts ought to be capitalized, and (2.) a similar question relating to the rents and royalties reserved by the two leases dated October 8 and December 16, 1912. The two questions were argued separately.

Howard Wright, for the trustee, stated the facts and referred to *In re Baskerville.* (1)

J. F. W. Galbraith, for the tenants for life. The two tenants for life are clearly entitled to the whole of the rents and royalties of the one fourth parts settled upon them respectively. The case is covered by authority: *Miller* v. *Miller* (2); *Greville-Nugent* v. *Mackenzie.* (3)

Eardley-Wilmot, for the remaindermen, did not argue to the contrary.

Sargant J. In my opinion it is quite clear that as regards the fourth part settled on Mathew Wayne Morgan, during his life, and as regards the fourth part settled on Eleanor Ann Bevan, during her life, the whole of the rents and royalties attributable to these fourth parts under the lease of January 5, 1889, granted by the testator in his lifetime, are payable to the tenants for life respectively. No doubt the testator has directed that his real and personal estate shall be converted by his trustee when he thinks fit, but that direction is succeeded by the very usual express provision that in the meantime and until conversion the "rents, profits and income" to accrue from such parts of his estate as shall remain unconverted shall go in the way in which the income of the proceeds of sale to arise from the conversion, if effected, would go, that is to say, shall go to the tenants for life for the time being. I have no doubt that the words "rents, profits and income" include the rents and royalties under this mining lease, and I answer the first question raised by the summons by declaring that the whole of their respective shares in such rents and royalties must be paid to the tenants for life.

The second question raised by the summons was then argued on the footing that the answer depended on whether the mines comprised in these leases were to be treated as open or unopen mines at the date of the testator's death. The evidence on this point was as follows.

Mr. R. W. A. Sothern, a mining engineer who had for upwards of thirty years acted as agent for the estates,

(1) [1910] 2 Ch. 329.
(2) (1872) L. R. 13 Eq. 263.
(3) [1900] A. C. 83.

made an affidavit in which he stated that the minerals comprised in the two leases of 1912 ought to be treated as minerals in open mines because they were worked and would in future be worked through and in connection with existing collieries of the Great Western Colliery Company which were used by the company and had been so used for many years, and because they would be worked in continuation thereof, and because no new sinking or other means of access to the property demised under the two leases of 1912 was either necessary or required. The same deponent made a further affidavit in which he stated:

"2. The coal comprised in the two leases of October and December, 1912, is part of the same seams as those comprised in the lease of 1889, and the minerals comprised in all three leases are contiguous, the property comprised in each lease being surrounded by other holdings of the Great Western Colliery Company.

"3. I can positively state from my own knowledge that the shaft used for working the minerals comprised in the lease of 1889, which shaft was made many years ago, was made and intended to be used for the working of and getting out not only the minerals comprised in that lease but also those comprised in the lease of October, 1912. The minerals comprised in the lease of December, 1912, are intended to be won through a shaft or shafts of the Great Western Colliery Company on another holding of that company adjoining. The area of the said minerals comprised in the leases of 1912 is not of sufficient extent to warrant the sinking of a separate shaft to work the minerals comprised in either or both of such leases independently, and they could not profitably be worked otherwise than by the same shafts as those by which other minerals leased to the Great Western Colliery Company are worked, and during the negotiations between the testator and the Great Western Colliery Company this fact was borne in mind by all parties and the company conducted its operations under the lease of 1889 with a view to the minerals comprised in the lease of October, 1912, being ultimately worked through and by the same workings. and the negotiations were always treated by the testator as negotiations for the further development of an existing and opened mine and not for the opening of a new mine."

Mr. T. J. Vachell, a mining engineer of Cardiff, also made an affidavit in which he stated:

"3. I have a knowledge of the workings of the Great Western Colliery Company under the lease of 1889 and from this and from my previous experience of the district I say with absolute confidence that the two leases of 1912 comprise the same seams of coal as are being worked under the property comprised in the lease of 1889 and can most conveniently be worked and, having regard to their extent, can only profitably be worked by means of the several shafts of the company. The shafts and generally the workings of the company are intended and are adapted for working and getting the minerals comprised in all three leases."

In the course of the proceedings Mr. R. W. A. Sothern made a further affidavit, sworn on February 21, in which he stated:

"2. In or about the year 1883 the minerals comprised in the lease of December 16, 1912, were leased to Messrs. Crawshay, who were then working the minerals under the land lying immediately to the north and now owned by the Great Western Colliery Company. Messrs. Crawshay sunk a shaft just outside the boundary of the testator's land, which shaft was intended by them to be used in working both the minerals leased to them by the testator or his predecessors in title as aforesaid and those lying under the land to the north of the land of the testator, all of the said minerals forming part of the same continuous seams and strata, and the said shaft and the workings connected therewith were adapted for working all the said minerals. For some years after the said lease to them Messrs. Crawshay proceeded to win and get the minerals from under the testator's said land, bringing the same to the surface by means of their said shaft, and by this means made accessible all the minerals comprised in the lease of December 16, 1912.

"3. In or about the year 1897 Messrs. Crawshay discontinued working the minerals both under the testator's land and also under the adjoining land, and their lease from the testator or his predecessors became determined. About the same time the minerals under the land adjoining the testator's land and the

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shaft sunk as aforesaid became vested in the Great Western Colliery Company.

"4. The area of the testator's land not being sufficient in extent to make the sinking of a separate shaft for working the minerals thereunder commercially feasible, the testator shortly after the termination of the said lease by Messrs. Crawshay entered into negotiations with the Great Western Colliery Company for the purpose of demising to them both the minerals comprised in the said lease of December, 1912," and the other minerals referred to in the deponent's previous affidavits. "The object of these negotiations was to enable the Great Western Colliery Company to work as a single colliery company all the minerals lying under a continuous tract of land which would include the minerals belonging to the testator comprised in the lease of 1889 and also those comprised in the leases of October and December, 1912, the same seams and strata running under the whole of the said tract, and the testator being well aware that apart from some such arrangement the minerals under the said pieces of land could not be profitably worked."

J. F. W. Galbraith, for the tenants for life. The minerals comprised in these two leases were open mines at the testator's death. As regards the lease of October, 1912, the evidence shews that the shaft sunk for getting the minerals included in the 1889 lease was adapted and intended for getting these minerals also when the occasion should arise. The area included in all three leases is one mining area consisting of the same seams partly in course of working at the testator's death, and the authorities go to the length of shewing that even if new shafts were afterwards sunk for following the same seams this would not prevent the whole area from being an open mine: *Chaytor* v. *Trotter* (1); *Clavering* v. *Clavering* (2); *Spencer* v. *Scurr* (3); *Bagot* v. *Bagot* (4); *Earl Cowley* v. *Wellesley* (5); *Elias* v. *Snowdon Slate Quarries Co.* (6); *Campbell* v. *Wardlaw.* (7)

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(1) 87 L. T. 33.

(2) (1726) 2 P. Wms. 388.

(3) (1862) 31 Beav. 334.

(4) (1863) 32 Beav. 509, 516, 517.

(5) (1866) 35 Beav. 635, 639; L. R. 1 Eq. 656.

(6) (1879) 4 App. Cas. 454, 465.

(7) (1883) 8 App. Cas. 641, 646.

The decision of Kekewich J. in *In re Maynard's Settled Estate* (1) is distinguishable, since the learned judge in that case based his decision—whether rightly or wrongly—on the fact that the mining properties were separated by a strip of intervening foreign land. That case has no application to the minerals comprised in the lease of October, 1912; while as regards the minerals comprised in the lease of December, 1912, the further evidence now before the Court shews that these minerals were in fact worked prior to the testator's death under the lease granted to Messrs. Crawshay, and there is no evidence of abandonment by the testator: *Greville-Nugent* v. *Mackenzie.* (2)

Eardley-Wilmot, for the remaindermen. The question whether a mine which is not actually opened during the testator's life is to be treated as an open mine depends on the intention of the testator, and that intention is to be gathered from what takes place in the testator's lifetime. The general rule is stated in *Campbell* v. *Wardlaw* (3), which shews that a "notional" opening is the exception. The question is whether on the facts the mines comprised in the lease of October, 1912, were "notionally" opened so as to fall within such exception. It is submitted that they were not. As to the mines comprised in the lease of December, 1912, these remained unworked for fifteen years and therefore should be treated as abandoned mines. If they were then abandoned mines, they were not open mines at the date of the testator's death, and the rents and royalties should be capitalized.

Sargant J. I have now to deal with the question of the rents and royalties under two leases granted by the trustee of the will under his power. The first is a lease of October 8, 1912, which comprises the southern part of the northern portion of the testator's land, and the second is a lease of December 16, 1912, which comprises the southern portion of the testator's land, that southern portion being separated by a considerable interval from the northern portion. As regards the southern part of the

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(1) [1899] 2 Ch. 347.

(2) [1900] A. C. 83.

(3) 8 App. Cas. 641, 646.

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northern portion of the testator's land, the facts are that these mines had not in fact been worked during the testator's lifetime, but a pit had been sunk on the northern part of the northern portion by lessees from the testator, and that pit had been placed in a position for working, and was intended to be used ultimately for working not only the mines under the northern part of the northern portion, but also the mines under the southern part of the northern portion. The testator had in fact been for a long time prior to his death in negotiation with the Great Western Colliery Company, who were the lessees of the northern part of the northern portion of the testator's land, for the purpose of effecting a lease to them of the southern part of the northern portion also. These negotiations were, I gather, the negotiations which were continued after the testator's death, and which ultimately resulted in the lease of October 8, 1912. Under those circumstances, it seems to me clear on the authorities that the mines under the southern part of the northern portion of the testator's land were open mines no less than the mines under the northern part. From the observations made by the Court of Appeal in *Chaytor* v. *Trotter* (1), and especially from what was said by Stirling L.J., it seems to me that an open mine means a mine which is "in course of being worked," and that a mine may fall within that description if a shaft has been sunk down to the same seams and the mine is capable of being worked through that shaft whenever opportunity arises. The sinking of the shaft is obviously a process for the purpose of working the mines and forms part of the working of the mines, although no single piece of coal should in fact be hewn. Indeed, the cases go a good deal further; they might and probably would justify me in holding that these mines under the southern part of the northern portion, which are the same seams which were being worked under the northern part, would be open mines, even if they had to be worked by following the seams by means of fresh pits. That, however, is a question which does not arise in the present case. The question in the present case is an easier one, and in my opinion it is quite clear upon the authorities that the mines under the southern part of the northern portion are to be deemed open mines.

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(1) 87 L. T. 33.

Then comes the question with regard to the mines under the southern portion of the testator's land. I should have felt very great difficulty if I had to decide this question upon the evidence as it stood before a further affidavit was put in this morning. As regards that further evidence Mr. Eardley-Wilmot did not desire, on behalf of the remaindermen, to have time to answer it, and no doubt the facts stated in it are perfectly well ascertained. It now appears from this affidavit that these mines had in fact been worked, or part of these seams had been worked, during the testator's lifetime. In or about the year 1883 a lease of the mines had been granted to Messrs. Crawshay, who had a pit lying to the north of the area in question, and they worked these mines from that time forward until about the year 1897, when the mines comprised in their outside leases, or it may have been under their freehold, and the mines under this portion of the testator's estate, became unprofitable to work, and the lease was determined or surrendered by Messrs. Crawshay. Thereupon negotiations were opened by the testator with the Great Western Colliery Company. This is what is said in the affidavit, that the testator, shortly after the determination of the said lease by Messrs. Crawshay, entered into negotiations with the Great Western Colliery Company for the purpose of demising to them, amongst other minerals, the minerals lying under the area of land which were ultimately dealt with by the lease of December 16, 1912, and he intended that those mines should be worked, not by a shaft sunk on the area of the land itself, but by a shaft situated on an adjoining piece of land; and apparently he had the idea that the whole of the mines under that southern part would be worked in conjunction with the mines under the northern portion. At any rate, there is no evidence whatever that the testator in any way abandoned the working of the mines under this southern portion. On the contrary, when the working was discontinued for the reason which I have mentioned, he did his best to ensure the continuance or the resumption of the working of these mines. Under these circumstances, it seems to me clear that these mines also must be treated as mines which were

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open mines at the time of the death of the testator. Accordingly, I come to the conclusion that, in the case of the minerals comprised in both leases, the whole of their respective shares of the rents and royalties fall within the express provisions of the will and are payable to the respective tenants for life.

Solicitors: *Rubinstein, Nash & Co.*

A. C.

ASTBURY J.
1914
March 13.

In re HARRIS CALCULATING MACHINE COMPANY.

SUMNER *v.* THE COMPANY.

[1913 H. 2823.]

Company—Debenture—Conditions—Place fixed for Payment of Principal—Default in Payment of Interest—Demand at Place—Limit of Borrowing Power—Excess—Pleading—Rules of the Supreme Court, Order XIX., *r.* 14.

A company having borrowing powers limited to 3000*l.* procured an overdraft from their bankers on the guarantee, up to 3000*l.*, of the plaintiff and two others. When the overdraft was very nearly 3000*l.*, each guarantor at the request of the company gave the company his cheque for 1000*l.*, and the company afterwards paid off the overdraft with these cheques. The company issued to each guarantor a debenture for 1000*l.* and interest with conditions which made the principal payable, inter alia, if the holder should serve a notice on the company requiring payment of principal and interest and the company should make default for three days in payment of any part thereof, and that the principal should be paid at Lloyds Bank, 222, Strand. The plaintiff and another debenture-holder gave the company notice to pay off the principal and interest; the company made default for three days, and thereupon the plaintiff brought this action to enforce the debentures, asking the usual relief. The principal defence pleaded was that the limit had been exceeded. No demand for payment had been made at Lloyds Bank. This objection was not pleaded, but was raised at the hearing:—

Held, (1.) that the condition for payment at Lloyds Bank applied only to principal, and as the company had made default in payment of interest for three days after the plaintiff's demand, the principal had become due.

Thorn v. *City Rice Mills* (1889) 40 Ch. D. 357 and *In re Escalera Silver Lead Mining Co.* (1908) 25 Times L. R. 87 distinguished.

(2.) That the money was advanced by the plaintiff and the others for the purpose of, and was applied in, paying off the overdraft at the bank, and therefore the limit on the directors' borrowing powers had not been in substance exceeded.

In re Wrexham, Mold and Connah's Quay Ry. Co. [1899] 1 Ch. 440 applied.

Semble, the first objection ought to have been pleaded as "any condition precedent, the performance . . . . of which is intended to be contested" under Order XIX., r. 14.

THIS action was brought by the plaintiff on behalf of himself and all other debenture-holders of the Harris Calculating Machine Company, Limited, against the company for a declaration that three debentures for 1000*l.* each were a first charge on the assets of the company, and for the account, inquiries, and order for payment usual in debenture-holders' actions. The company was incorporated in 1910 with a power to borrow on debentures limited by a provision in article 108 that the amount for the time being remaining undischarged of moneys raised or borrowed by the directors for the purposes of the company should not exceed 2000*l.* On August 13, 1911, the limit was by resolution, duly passed at a general meeting of the company, extended to 3000*l.* On July 17, 1911, the plaintiff together with Sir William Borrodaile Savory and Charles Joseph Willis executed a joint and several guarantee to Lloyds Bank of any overdraft of the company up to 3000*l.*

On the same date an agreement was executed between the company and the three guarantors providing that the company should issue to each of the guarantors a debenture forming one of a series of debentures to secure a sum not exceeding 3000*l.* and any interest thereon payable to Lloyds Bank Limited under the said guarantee, such series to be issued if and when the guarantors or any of them should be called upon to pay any sum of money under the said guarantee, and so as to secure to each of the guarantors any sum or sums of money paid by them in respect of the guarantee and remaining unpaid.

In July, 1913, the company informed the guarantors that the overdraft at Lloyds Bank had very nearly reached the limit of 3000*l.*, and thereupon each of the guarantors gave the company his cheque for 1000*l.*, which was applied by the company in reducing their overdraft at Lloyds Bank.

In return for these cheques, the company issued to each of the guarantors a debenture for 1000*l.* in pursuance of the said agreement. Each debenture was stated to be one of a series of three debentures of 1000*l.* each, which were to be payable pari passu and to rank equally as a first charge on the assets of the company, but to constitute a floating security only, and was made subject to the following, among other, conditions :—

"3. The principal moneys hereby secured shall immediately become payable in any of the following events :—

"*a.* If the registered holder shall serve notice in writing upon the company requiring payment of the principal moneys and interest (if any) and the company has made default in payment of such principal moneys and interest or of part thereof for three days after such service.

"*b.* If the company makes default for one month in the payment of any interest hereby secured and the holder before such interest is paid by notice in writing calls in the principal moneys."

"5. The company may at any time give notice in writing to the registered holder to pay off this debenture and at the expiration of six months from such notice being given the principal moneys hereby secured shall become payable."

"12. The principal moneys secured by this debenture will be paid at Lloyds Bank Limited, 222, Strand, W.C., or other the company's bankers for the time being, on presentation of this debenture, which may be surrendered on payment."

These three debentures were the only debentures issued by the company.

On July 22, 1913, the plaintiff and one of the other debenture-holders served notice on the company requiring payment of the principal and interest secured by their debentures. The company made default in payment of the principal and interest for three days after this notice, and on July 28, 1913, these two debenture-holders, in exercise of a power contained in the debentures, appointed a receiver.

The writ in this action was issued on November 14, 1913.

Micklem, K.C., and *Fairfax Luxmoore*, for the plaintiff. This is an ordinary debenture-holder's action, and it is admitted that

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the money was advanced and is due. The main defence raised in the pleadings is that the 3000*l.* borrowed was in excess of the limit of 2000*l.* fixed by the articles. The answer to that is that the limit was properly raised to 3000*l.*, and that the money secured by the debentures was applied in paying off the money borrowed from the bank, so that the liability of the company was never increased beyond 3000*l.*

Sir Charles Macnaghten, K.C., and *R. H. Hodge*, for the company. Clause 12 of the conditions of the debentures makes the money payable at the bank. It never became payable because it never was demanded at the bank: *Thorn* v. *City Rice Mills* (1), where North J. cites the rule from Sheppard's Touchstone, p. 136. That case was followed by Warrington J. in *In re Escalera Silver Lead Mining Co.* (2) Those cases are conclusive.

[*Micklem, K.C.* This point is not raised in the pleadings, and by Order XIX., r. 14, "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be)."]

This is not a condition precedent. The plaintiff has to prove that the money is due, and it is not due until demand has been made at the bank. Moreover the articles as amended distinctly provide that the money outstanding shall not at any time exceed 3000*l.* When the company borrowed 1000*l.* from the plaintiff the bank debt was close on 3000*l.* and was not paid. There was therefore a time at which the company owed nearly 4000*l.*

Micklem, K.C., in reply. *In re Wrexham, Mold and Connah's Quay Ry. Co.* (3) is a clear authority that a limit of this kind is not exceeded where money borrowed in excess is intended to be applied, and is applied, in paying off money already owing.

ASTBURY J. This is an action by a debenture-holder on behalf of himself and all other debenture-holders against the defendant company asking for the usual debenture-holders' relief.

The action has been defended substantially on two grounds,

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(1) 40 Ch. D. 357, 359.

(2) 25 Times L. R. 87.

(3) [1899] 1 Ch. 440.

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(1.) that the plaintiff has proved no default at the date of the writ in the action, and (2.) that the moneys borrowed on the security of the debentures were in excess of the company's borrowing powers. [His Lordship stated the facts of the case as above, and continued:]

The defendants' counsel took the preliminary point that this action is not maintainable because no proof was tendered that the plaintiff had applied at Lloyds Bank under condition 12 of the debenture for his principal moneys, and therefore no default on the part of the company had been proved. He referred to *Thorn* v. *City Rice Mills* (1), where there was a provision that if the company made default for fourteen days in payment of interest then the principal moneys should become payable, followed by a condition that the principal moneys and interest secured should be paid at an office named. In that case the company was a prosperous company. A payment of interest which was due on November 28 was not made; the plaintiff made no demand for it at the office in question. He issued a writ and moved for the appointment of a receiver. The company proved that they had ample funds to meet their liabilities and that it was an oversight on the secretary's part that the cheque for the interest in question had not been posted in the ordinary course. North J. held that there was no default on the part of the company because the interest which was unpaid was the money which had to be paid at the particular office in question and the creditor had not proved default in payment there, and that under the terms of the conditions the principal money was not proved to have become payable at the date of the motion, or the action. A similar result occurred in *In re Escalera Silver Lead Mining Co.* (2), where again the condition was that if default was made in payment of interest then the principal should become due and there was a particular place appointed for the payment.

In my judgment neither of those cases really governs the present case. Here condition 12 which provides for the place of payment is limited to principal moneys. In condition 5 where the company itself proposes to repay the debenture it may give notice in writing to pay off the debenture, and upon the expiration of six months from such notice being given the principal moneys shall become payable; on the other hand, under condition 3 the principal moneys are to become payable if one of two things occurs, namely, if after the holder has given notice requiring payment of principal and interest default is made by the company in payment of either. Now in this case, without dealing with the question whether the company made default in payment of its principal money for the moment, it is perfectly clear that on the expiration of the notice in question the company did make default and has continued ever since to make default in payment of such interest as was owing to the plaintiff at the expiration of the notice. That interest was not money which the plaintiff was under any obligation at all to obtain payment of at Lloyds Bank, and in my judgment there has been proved a default on behalf of the defendant company within the meaning of the condition. On the merits of the case there is no question at all, because the company has not paid into Lloyds Bank since July 30, 1913, when the last 1000*l.* for which a debenture was issued was paid, any moneys at all towards the repayment of this debt.

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(1) 40 Ch. D. 357, 359.

(2) 25 Times L. R. 87.

I hold, therefore, that there was sufficient default at the date of the issue of this writ to justify the plaintiff in bringing the action.

Further than that, I am not at all satisfied that Order XIX., r. 14, does not apply in this case, the rule being that "any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading." Here the defendants have not given the slightest warning that they were going to take any such point as this in the pleadings, and I think it should have been done if a point of that character was going to be relied on.

The next point which was taken on behalf of the defendant company was this, that the borrowing power being limited to 3000*l.* and the overdraft at Lloyds Bank being about that amount when the plaintiff handed in his cheque in exchange for this debenture of July 19, 1913, that increased the liability of this company to 4000*l.*, and therefore it was an illegal borrowing which they could not secure by the debenture.

I do not think that it was anything of the sort. This cheque was given as conditional payment to be handed over to Lloyds Bank for the purpose of reducing the overdraft by its amount. The debenture was handed in exchange for the cheque with the obvious intention by both parties that it should stand as a security, which I think it did, for 1000*l.* to be applied in reduction of the overdraft which was to be effected by means of the cheque. I think the matter falls within the general principle of the Court as stated in the *Wrexham Case* (1) by Lindley M.R.: "A prohibition against borrowing more than a given sum is only in reality and substance disobeyed when an obligation to pay more than that sum is contracted. Courts of Equity have always looked into the facts to see whether the prohibition has been really disobeyed or not. . . . So far as the money has been applied in discharging debts or liabilities which could be enforced against the company, the prohibition against borrowing does not apply to it, and the Courts have so decided." Rigby L.J. in his judgment says, "The test is: has the transaction really added to the liabilities of the company?" In this case I do not think it did.

That disposes of the issues that are raised in the action.

The plaintiff is entitled to succeed, and I give judgment for the usual relief, declaring that the debentures constitute a charge, with the ordinary consequential accounts and inquiries.

Solicitors: *Mawby, Mawby & Morris; Julius A. White.*

J. R. B.

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(1) [1899] 1 Ch. 440, 446, 447, 451.

In re E. G. A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION.

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April 7.

Lunacy—Lunatic not so found by Inquisition—Receiver—Quasi-Committee—Solicitor appointed by Quasi-Committee—Costs—Delay in Payment—Personal Liability of Quasi-Committee—Statute of Limitations—Application by Solicitor—Lunacy Act, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 116, *sub-s.* 2; *s.* 120.

Solicitors appointed by the quasi-committee of a lunatic not so found by inquisition did work in respect of the lunatic's real estate, the costs of which were not paid to them inasmuch as all the lunatic's income was applied for her benefit and there were no funds available. Some of these costs were, as against the quasi-committee, barred by lapse of time:—

Held, that the quasi-committee was the statutory agent of the lunatic and was not personally liable to the solicitors appointed by him to act for the lunatic; the costs of the solicitors were payable out of the estate of the lunatic; the relation of solicitor and client did not exist between the solicitors and the quasi-committee, therefore the question of the Statute of Limitations could not be raised by him; and, if it might be raised by the judge, that in the present case it ought not to be pleaded.

APPEAL from a decision of a Master in Lunacy.

On November 24, 1900, an order was made pursuant to s. 116, sub-s. 1 (*c*), of the Lunacy Act, 1890, appointing one F. G. to exercise certain of the powers of a committee of the estate of E. G., and this order provided, inter alia, "that the whole net income of the said E. G. be allowed for her maintenance."

In February, 1913, Mr. William Every was appointed by F. G. to act as his solicitor in the place of a gentleman who had previously acted for him. Mr. Every's London agents were Messrs. Torr & Co.

At the time when Mr. Every was instructed to act as F. G.'s solicitor, the lunatic's estate consisted of certain real property in Birmingham, and certain funds in Court standing to the credit of the said E. G., namely, 4962*l.* 7*s.* 3*d.* Consols; 200*l.* stock of the Exeter Gas Light and Coke Company.

From time to time it became necessary for the receiver F. G. to apply to the Master in Lunacy for leave to concur in granting leases of the Birmingham property and to do other acts with reference to the management of the estate. The costs of these

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applications were dealt with by the Master in different ways. Sometimes he refused to make an order as to costs, leaving them to be dealt with at some future taxation; sometimes he gave directions for taxation and payment. The orders which are material for the present purposes were as follows :—

(*a*) Two orders dated respectively April 21, 1904, and May 15, 1905.

These orders directed the receiver to concur in the granting of certain leases and other matters and that his reasonable and proper costs of the application and any costs not already paid were to be taxed and paid by him out of any moneys in his hands available for the purpose. These costs were taxed and certified at the sums of 48*l.* 13*s.* 1*d.* and 58*l.* 5*s.* 7*d.* respectively, but they were not paid, because the whole of the lunatic's income had been allowed for maintenance and there were no moneys in F. G.'s hands available for payment of costs. The Master refused to allow them to be raised out of capital.

(*b*) Three orders dated respectively January 11, 1906, August 9, 1906, and April 12, 1907.

These were orders giving the receiver leave to concur in granting leases and containing other directions. They contained no directions as to costs, the Master refusing to include any such directions because there were then no funds available for their payment. On making the orders the solicitors applied for taxation and payment of costs, but were informed by the Master that they must wait until there were sufficient funds in the receiver's hands and then apply for a general taxation.

There never was any surplus of income, nor any fund available for payment of costs until quite recently when a legacy of 200*l.* under Mr. Every's will became payable. He died on December 23, 1906, and was succeeded as solicitor by his partner Mr. Thomas Phillips, who continued to act as solicitor for the receiver in the matter of E. G.'s lunacy and to employ Messrs. Torr & Co. as his London agents.

On June 10, 1912, F. G. changed his solicitors and instructed Messrs. Jackson, Smart, Geake & Co.; and thereafter neither Messrs. Every & Phillips nor Messrs. Torr & Co. had any control over the lunacy proceedings, nor had they the opportunity of ascertaining whether there were any funds available for the payment of their costs.

Shortly after this, Messrs. Torr & Co. applied to Messrs. Jackson, Smart, Geake & Co. for payment of their costs if there were funds available for the purpose, but Messrs. Jackson & Co. refused to take any steps to obtain payment of these costs, and they raised the contention that the costs were not in fact payable, because Mr. Every had by his will released E. G. from the obligation of paying them. On June 10, 1913, the present summons was issued by one of Mr. Every's executors and Mr. Phillips asking for an order—

"1. That the costs of F. G. incurred by him in his capacity as the person appointed by the order dated 24th November, 1900, to exercise the powers of a committee of the estate of the above named E. G. prior to the 10th day of June, 1912, which have not already been taxed together with the costs of this application may be referred to the proper officer for taxation.

"2. That the said costs when taxed together with the sum of 48*l.* 13*s.* 1*d.* (being the amount of the costs taxed pursuant to an order in this matter dated 21st April, 1904) and the sum of 58*l.* 5*s.* 7*d.* (being the amount of the costs taxed pursuant to an order in this matter dated 15th May, 1905) may be ordered to be paid to Messrs. Torr & Co. . . . . the London agents for the said William Every and Every & Phillips by the said F. G. out of the estate of the above named E. G.

"3. That if the moneys in the hands of the said F. G. available for the purpose are insufficient to pay the said costs a sale may be directed of the funds in Court to the credit of this matter for the purpose of raising the said costs."

When this summons came before the Master, the receiver caused it to be strongly opposed upon two grounds, namely, that the costs in question were barred by the operation of the Statutes of Limitations, and that under Mr. Every's will the obligation to pay such costs had been released. It was not suggested that the costs had not been properly incurred by the solicitors, or that there was any reason why they should not be paid, except upon these two grounds.

At the hearing of the summons the second objection was not

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very seriously argued, and the Master decided that Mr. Every's will did not affect the question. On the first objection, however, he decided that the solicitors' proper remedy was to sue the receiver personally, and, therefore, that they were not entitled to recover out of the estate of the lunatic any costs incurred by the receiver which were statute-barred as against the receiver. He accordingly ordered that the claim of the applicants for the two sums of taxed costs were to be disallowed; the applicants were to bear their own costs of the application; and the proper costs of the receiver which were not statute-barred as against him were to be taxed and raised out of the funds in Court.

The applicants appealed from this decision, and the appeal came before Phillimore L.J., who adjourned the matter into Court.

Romer, K.C., and *H. M. Humphry*, for the appellants. The fact that the orders of January 11, 1906, August 9, 1906, and April 12, 1907, contained no direction for the payment of our costs does not mean that we are not entitled to them. The Master only refused to include such a direction because there were at the time no funds available for their payment. If the decision of the Master is right, a solicitor appointed by a receiver or quasi-committee will have to sue for his costs from time to time as they become due, which will be inconvenient and expensive. We submit that a solicitor who acts for a receiver in lunacy cannot sue the receiver for his costs; he does not give credit to the receiver but to the estate; and he has a lien on the funds for his costs, a common law lien to which no statute of limitations applies. That lien has not been abrogated by the Solicitors Act, 1860.

The position of a receiver in lunacy differs from that of a receiver appointed in an action inter partes; he is the agent of the lunatic for the purpose of carrying on his business, and, in the absence of evidence that he intended to pledge his personal credit, the mere fact that he carried on the business under the order does not make him personally liable for goods supplied: *Plumpton* v. *Burkinshaw*. (1) The solicitor is agent of the lunatic,

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(1) [1908] 2 K. B. 572.

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not of the receiver. The position of a solicitor in a winding-up is analogous; he is always spoken of as the solicitor of the liquidator although he is appointed under powers given by the Companies (Consolidation) Act, 1908. The liquidator represents the company and is not personally liable for costs: *Ex parte Watkin.* (1) A trustee in bankruptcy is in a different position, for the property vests in him. A solicitor who prosecutes a commission in lunacy against a person who is found to be a lunatic can institute a creditor's suit against the estate in respect of his costs: *Chester* v. *Rolfe.* (2) The theory is that such proceedings are necessaries and for the benefit of the lunatic: *Ex parte Price* (3); *In re Weaver* (4); and necessaries supplied to a lunatic constitute a debt which is not barred by any statute of limitations: *Stedman* v. *Hart.* (5) A distinction has been drawn between costs incurred by the receiver personally and those of proceedings directed by the Court: *M'Bride* v. *Clarke.* (6) The fact that the Statute of Limitations bars our remedy against the receiver will not prevent the Court from seeing that justice is done, and a solicitor who assists the Court gets his costs, even though that might not be the case between ordinary litigants: *Ex parte Simmonds* (7); *In re Opera.* (8)

Costs were provided for in the first two orders and they ought to be paid now. If they are payable to the solicitor, the Statute of Limitations does not apply; if they are payable to the receiver, the solicitor has a lien on them which is not affected by the statute. The solicitor is entitled in the presence of the receiver to ask for taxation and payment of these costs to himself. The order should be made for taxation of the costs of the appellants and payment to them. A receiver has the same powers as a committee and acts under the control of the Court: Lunacy Act, 1890, s. 109, s. 116, sub-s. 3, ss. 120, 124; Rules in Lunacy, 1893, r. 2.

A. E. Woodgate, for the receiver. The solicitor was the solicitor of the receiver, not of the lunatic, and the receiver is personally liable to him for costs. The receiver can change his solicitor as often as he pleases, and the solicitor may have to advise him as against the lunatic. In the present case an order has been made dispensing with service on the lunatic, which would have been unnecessary if the solicitor had been acting for the lunatic, for in that case no notice would have been required. The solicitor has no lien on the estate. It has been held that he has no lien on the lunatic's real estate: *Barnesley* v. *Powell* (1), which is not overruled on this point by *Shaw* v. *Neale* (2); and by s. 28 of the Solicitors Act, 1860, the Court cannot give a solicitor a charge where his debt is barred by any statute of limitations. A receiver who, as agent for a lunatic, instructs a solicitor is entitled to plead the Statute of Limitations against his claim for costs: *In re Watson.* (3) The only decision to the contrary is *Stedman* v. *Hart* (4), and the basis of that decision is gone, for it is impossible to say now that a solicitor's action for costs against a lunatic would be stayed. If these costs are for necessaries an action may be brought against a lunatic for necessaries and only six years' arrears can be recovered: *Brockwell* v. *Bullock.* (5) The appellant cannot himself make a substantive application in the lunacy; this application ought to have been made by the receiver, and the solicitor has no locus standi: *In re Townshend.* (6)

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(1) (1875) 1 Ch. D. 130.
(2) (1853) 4 D. M. & G. 798.
(3) (1751) 2 Ves. Sen. 407.
(4) (1837) 2 My. & Cr. 441.
(5) (1854) Kay, 607.
(6) (1839) 1 Ir. Eq. Rep. 203.
(7) (1885) 16 Q. B. D. 308.
(8) [1891] 2 Ch. 154.

[BUCKLEY L.J. referred to *In re Clarke.* (7)]

Romer, K.C., in reply.

April 7. COZENS-HARDY M.R. This appeal raises an important question as to the position of a solicitor nominated by a "person" appointed under s. 116 of the Lunacy Act, 1890. I say a "person," because it is important to remember that the word "receiver," which is often used, is not a strictly accurate description of his position. He is more accurately described as a quasi-committee. Under ss. 116 and 120 the judge may order him to do a great many acts on behalf of the lunatic, and, in particular, to grant leases. In obedience to such directions a

(1) (1750) Amb. 102.
(2) (1858) 6 H. L. C. 581.
(3) [1899] 1 Ch. 72.
(4) Kay, 607.
(5) (1889) 22 Q. B. D. 567.
(6) (1865) 2 D. J. & S. 519.
(7) [1898] 1 Ch. 336.

solicitor named by him does what is necessary, and, in so doing, is entitled to certain costs. What then is the position in point of law of the quasi-committee? I think that he is a statutory agent of the lunatic who cannot himself appoint an agent. He acts on behalf of the lunatic under the statutory powers conferred upon him: see *Plumpton* v. *Burkinshaw* (1), and especially the judgment of Fletcher Moulton L.J. It would seem to follow, therefore, that in giving a retainer to the solicitor he did not render himself personally liable to the solicitor any more than by ordering goods in carrying on a business under the directions of the Court he made himself liable to the tradespeople with whom he dealt: *Plumpton* v. *Burkinshaw*. (1) He is not like a trustee in bankruptcy in whom the bankrupt's estate is vested. He is more like a liquidator in a winding-up appointed by the Court. We have been referred to several authorities, some of which undoubtedly speak of the solicitor's client as being the committee: see *Barnesley* v. *Powell*. (2) I think, however, that this is a loose mode of expression. It is true that the solicitor is not appointed by the Court, but that is really unimportant. If I tell my agent to retain a solicitor on my behalf, it makes no difference whether I myself name the solicitor to be retained and instructed or whether I leave the selection of the solicitor to the agent. In either case I am the client and the agent is not the client. I assume, of course, that the solicitor knows the limited authority of the agent. In *In re Weaver* (3) Lord Cottenham granted an injunction restraining an action brought by an auctioneer employed by the committee with the sanction of the Master. The Lord Chancellor said: "A claim arising in the course of an employment under a lunacy, and for the purpose of carrying into effect the directions of the Court in that lunacy, unless there was some special agreement to the contrary, would be properly the subject of inquiry before the Master." That seems to me to be a satisfactory principle upon which to proceed. In *Chester* v. *Rolfe* (4) it was held by the Lords Justices that the costs of the solicitor employed in the lunacy might on the death of the lunatic be treated as a debt payable out of his estate.

(1) [1908] 2 K. B. 572, 577.
(2) Amb. 102.
(3) 2 My. & Cr. 441, 442.
(4) 4 D. M. & G. 798, 801.

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This was following Lord Langdale's decision in *Williams* v. *Wentworth* (1), that such costs might be regarded as necessaries for the benefit of the lunatic. Knight Bruce L.J. said: "The solicitor . . . . is entitled to stand directly in his own right as a creditor against the estate of the lunatic for the costs." And Turner L.J. said: "Assuming the proceedings upon the commission to have been proper, and for the benefit of the lunatic, I think the solicitor employed therein has a right to sue in order to recover his costs of prosecuting those proceedings. I take it that the employment of a solicitor by the person issuing the commission, and the acceptance by the former of such employment, is on the faith of his proper costs being paid out of the lunatic's estate. The solicitor accepting the employment accepts it subject to that condition, and looks to the estate for payment of his costs." In my opinion, the true view is that the relation of solicitor and client does not exist, with all its consequences, between the solicitor and the quasi-committee.

The facts in the present case raise the point which I have considered in a direct form. The solicitor nominated by the quasi-committee has done work and become entitled to costs. Two orders were made in 1904 and 1905 under which certain costs have been taxed, and the orders contain a direction that the costs when taxed should be paid by the quasi-committee, though not saying to whom. As to other bills there has not yet been any order for payment. The costs were to a large extent connected with leases which the Court directed the quasi-committee to execute. The quasi-committee has changed his solicitor, and now takes the objection that, as to such of the bills as are more than six years old, the Statute of Limitations would be a clear defence to an action brought against him, and that the solicitor's right to be paid out of the lunatic's estate can only be by virtue of his right to stand in the shoes of the quasi-committee and to get the benefit of his indemnity. The Master assented to this view. In my opinion the order so made is wrong. The solicitor has an independent right against the lunatic's estate. If the quasi-committee was not the client, it is not for him to raise any question as to the Statute of Limitations. The lunatic was the client, and it is for the Judge in Lunacy to say what ought to be done. Even if the statute could be pleaded—as to which I express no opinion—I think this is not a case in which the judge ought to direct it to be pleaded. Two orders, obtained by this solicitor, expressly directed that the taxed costs should be paid by the quasi-committee, though not naming the person to whom payment should be made. It would be little short of a scandal if those taxed costs were not paid. It may be that the solicitor who had notice of the orders, and in fact obtained them, might claim to be equitable assignee of so much of the lunatic's estate as is required to satisfy those orders. But I prefer to rest my judgment on the broader ground, and to draw no distinction between the bills which have been taxed pursuant to these two orders and other bills which have not yet been taxed.

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(1) (1842) 5 Beav. 325.

The result is that all the costs already taxed must be paid out of the lunatic's estate, and bills which have not yet been taxed must be taxed and paid without reference to the Statute of Limitations. The costs of all parties of this application must be paid out of the estate.

Buckley L.J. I agree. A receiver appointed under s. 116 of the Act may, I think, be compendiously described as standing in the position of a statutory attorney or agent of the lunatic. He is constituted agent by the act of the Court which appoints him (as he is generally called) receiver. Under s. 120 it is his duty, if so directed, to do many things which will involve the employment of persons such as auctioneers, land agents, valuers, and so on. As matter of construction of the Act it seems to me impossible to say that he is to employ these persons upon his own credit and become liable to them. He employs them as agent of the lunatic. He does not pledge his personal credit, but pledges the credit of the lunatic, that is to say of the estate in lunacy. His position is for the present purpose analogous to that of a liquidator in winding up. The liquidator employs a solicitor, but he is not personally responsible to him for his costs and, if the estate is insufficient for payment of them, the solicitor must pro tanto remain unpaid: *Ex parte Watkin.* (1) His

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(1) 1 Ch. D. 130.

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position is totally different from that of a trustee in bankruptcy. In bankruptcy the property vests in the trustee. In the winding-up or in lunacy nothing vests in the liquidator or committee. It has been expressly decided in lunacy that the committee carrying on the business of the lunatic under an order in the lunacy is, in the absence of evidence that he intended to pledge his personal credit, not personally liable for goods supplied. This being so, there are two grounds upon which, in my judgment, these costs ought to be paid. The one is that if the Statute of Limitations applies it is for the lunacy jurisdiction to say whether it ought to be pleaded. I reply that it ought not. The other is relevant to the orders of 1904 and 1905, which directed that the costs be paid by the receiver. These orders were, of course, communicated to the solicitor. He in fact obtained them. That amounted, I think, to an equitable charge in his favour upon the estate.

For these reasons I think that the costs already taxed under the orders of April 21, 1904, and May 15, 1905, and the costs to be taxed under this present order in respect of the orders of January 11, 1906, August 9, 1906, and April 12, 1907, ought to be allowed out of the estate. (1)

Solicitors: *Torr & Co., for Every & Phillips, Honiton; Jackson, Smart, Geake & Co.*

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(1) The order as finally settled was as follows:—

"Upon the application of The Reverend George Every of Tipton Saint John in the county of Devon clerk in holy orders one of the executors and trustees of the will of the late William Every and Thomas Phillips of Honiton in the said county solicitor (practising as Every and Phillips) by way of appeal from the order of the Masters in Lunacy dated 11th December 1913 and the appeal coming on to be heard before Lord Justice Phillimore on the 18th March 1914 and before us on the 30th March 1914 and upon hearing counsel for the appellants and for the respondents F. G the person appointed to exercise certain of the powers of a committee of the estate in this matter and Emily G. the other executor and trustee of the said will—

"We do order as follows:—

"1. The said order is discharged.

"2. The reasonable and proper costs of the said William Every and Thomas Phillips acting as solicitors in this matter for the said F. G. until

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10th June 1912 of incidental to and consequent upon the orders dated 11th January 1906, 9th August 1906, 12th April 1907 and 24th February 1908 and of general management not already directed to be taxed are to be taxed and certified together with the sums of 48*l*. 13*s*. 1*d*. and 58*l*. 5*s*. 7*d*. the amount at which costs have been certified pursuant to orders of 21st April 1904 and 15th May 1905 respectively.

"3. The reasonable and proper costs of Messrs. Jackson Smart Geake & Co. acting as solicitors in this matter for the said F. G. from the said 10th June 1912 of general management not already directed to be taxed are to be taxed and certified.

"4. The reasonable and proper costs of incident to and consequent upon this application and appeal of the appellants and of the respondents are to be taxed and certified.

"5. The fund is to be dealt with as directed in the Payment Schedule."

The Payment Schedule provided "By sale of sufficient Consols:—Raise and pay costs when certified pursuant to this order."

H. C. R.

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JOHNSON *v.* BRIGHT-SMITH.

[1913 S. 356.]

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Jan. 23;
Feb. 2, 9;
March 18.

Will—Construction—Gift in Trust for Franciscan Friars—Validity—Roman Catholic Relief Act, 1829 (10 *Geo.* 4, *c.* 7), *ss.* 28 *to* 37.

Gift of residue in trust for "the society or institution known as the Franciscan Friars of Clevedon in the county of Somerset absolutely,"

Held, an absolute immediate gift to the individual friars composing the society or institution at the testator's death, and valid.

The provisions of the Roman Catholic Relief Act, 1829, which are directed to the suppression and prohibition of religious orders, or members thereof, of the Church of Rome, bound by monastic or religious vows, do not operate so as to render void an absolute immediate bequest to individuals ascertained at the death of the testator.

Cocks v. *Manners* (1871) L. R. 12 Eq. 574 followed.

Series of Irish cases—*Sims* v. *Quinlan* (1865) 17 Ir. Ch. Rep. 43; *Walsh* v. *Walsh* (1869) I. R. 4 Eq. 396; *Kehoe* v. *Wilson* (1880) 7 L. R. Ir. 10; *Liston* v. *Keegan* (1882) 9 L. R. Ir. 531; *Morrow* v. *M'Conville* (1883) 11 L. R. Ir. 236; *Murphy* v. *Cheevers* (1885) 17 L. R. Ir. 205; *Burke* v. *Power* [1905] 1 I. R. 119; *MacLaughlin* v. *Campbell* [1906] 1 I. R. 588; *Cussen* v. *Hynes* [1906] 1 I. R. 539—considered.

ADJOURNED SUMMONS.

By his will, dated November 2, 1906, Erasmus Smith, after appointing the plaintiffs executrix and executor and trustees

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thereof and bequeathing certain legacies and an annuity, devised and bequeathed all his real and personal estate not otherwise disposed of to and to the use of his executrix and executor on trust to convert into money such parts as should not consist of money and out of the moneys to arise from such conversion and his ready money to pay his funeral and testamentary expenses and debts and legacies (other than specific) and provide for the annuity and to hold the residue "in trust for the society or institution known as the Franciscan Friars of Clevedon in the county of Somerset absolutely." And the testator declared that "the receipt of the father guardian or other proper officer for the time being of the said Franciscan Friars shall be a sufficient discharge for any payments made to them."

The testator died on May 1, 1912, and his will was duly proved.

At the date of the will and the testator's death there was at Clevedon a society or community, consisting of six Franciscan Friars who had taken on themselves monastic vows, which was "the society or institution known as the Franciscan Friars at Clevedon" intended by the testator.

The plaintiffs took out this summons for the determination of the question whether the gift in trust for the "society or institution" was valid.

Coldridge, K.C., and *G. M. Hildyard*, for the plaintiffs.

Hughes, K.C., and *Austen-Cartmell*, for the testator's heir and next of kin. This is a gift to an illegal society and is void. It is impossible to say it is a gift to the members of the community or institution individually as personæ designatæ. It is a gift to the community or institution itself, a fluctuating body—to the members collectively as they exist banded together from time to time, a society of men whose existence in England is unlawful and illegal—to be used on the terms of the contract existing between the individuals. [Regulations of the Order of St. Francis and form of vow taken by the members were referred to.] That being so, it is a gift to a community or institution which is contrary to the policy of the law in this country, prohibited by the Roman Catholic Relief Act, 1829, and contrary to the intentions of the Legislature as expressed in the later sections of that Act. (1) That Act was an Act for the suppression or prohibition in this realm of religious orders or societies of the Church of Rome bound by monastic or religious vows. It is so referred to in the Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97), s. 15, and in the Roman Catholic Charities Acts of 1832 (2 & 3 Will. 4, c. 115), s. 4, and 1860 (23 & 24 Vict. c. 134), s. 7, by none of which Acts is it repealed or altered, and in *Rex* v. *Kennedy* (2) all the judges assumed that it was still in force. It provides for the registration of members of religious orders then resident within the United Kingdom, and prohibits under pain of banishment members from coming into the realm, and makes the admitting of any person as a member of a religious order a misdemeanour punishable by fine or imprisonment, and the person admitted to be deemed guilty of a misdemeanour and on conviction to be banished. The presence of any monastery in this country is contrary to law. Members of the Franciscan Order have no right even to be in this country, and every Franciscan is committing a misdemeanour every day of his life that he lives here. The policy of the Act being that monastic and religious orders should be prohibited and finally suppressed, the next natural step from that is that a gift to them is void. That is the course of reasoning adopted in the cases decided in Ireland, where it has been held that bequests in favour of Jesuits and members of other religious orders of the Church of Rome bound by monastic or religious vows are void as contravening the policy of the Act: Theobald on Wills, 7th ed. p. 360; *Sims* v. *Quinlan* (3); *Walsh* v. *Walsh* (4); *Kehoe* v. *Wilson* (5); *Liston* v. *Keegan* (6); *Burke* v. *Power* (7); *Cussen* v. *Hynes* (8); *MacLaughlin* v. *Campbell* (9); *Murphy* v. *Cheevers* (10); *Roche* v. *M'Dermott.* (11) In *In re Boyd* (12) Warrington J. expressed an opinion that a gift for the benefit

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(1) See note on p. 952, post.
(2) (1902) 86 L. T. 753.
(3) (1864) 16 Ir. Ch. Rep. 191; (1865) 17 Ir. Ch. Rep. 43.
(4) I. R. 4 Eq. 396.
(5) 7 L. R. Ir. 10.
(6) 9 L. R. Ir. 531.
(7) [1905] 1 I. R. 119.
(8) [1906] 1 I. R. 539.
(9) [1906] 1 I. R. 588.
(10) 17 L. R. Ir. 205.
(11) [1901] 1 I. R. 394.
(12) *The Times,* Nov. 25, 1907, p. 5.

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of the Benedictine Order would be contrary to the policy of the Act and void, and he did not see any other answer to such a question so long as the Act remained unrepealed. A gift to an individual whose presence is illegal is valid, but a gift to a collective body of illegal individuals is void. Unless the Irish cases are wrong, this gift is invalid. The testator clearly contemplated a body, not corporate but aggregate, which would go on from time to time. There being in this case an annuity outstanding, which might not fall in for some years, the residue would not be paid all at the same time. The gift cannot, on the construction of the will, be a gift to individuals at the time of the testator's death. A series of Acts subsequent to 1829 relaxed prohibitions against Roman Catholics to a certain extent. The Charitable Donations and Bequests (Ireland) Act, 1844, enabled gifts to be made of land or goods for building or supporting Roman Catholic places of worship, but contained a proviso (s. 15) to prevent that from rendering lawful any donations, devises, or bequests to persons holding religious or monastic vows, thereby shewing that such gifts were illegal. The Roman Catholic Charities Act, 1860, further facilitated gifts to Roman Catholics, but provided (s. 7) that nothing therein contained should be taken to alter the provisions of the Act of 1829 as to suppressing monastic societies. Every form of gift for the encouragement of the Roman Catholic religion is void except so far as the invalidity is removed by statute: *Cussen* v. *Hynes* (1); Halsbury's Laws of England, vol. iv. p. 122; vol. xi. p. 810. Though it may shock some ideas of religious toleration, the exemptions in favour of Roman Catholics rest on statute alone.

This gift is therefore void altogether ipso facto, being for a purpose contrary to public policy, that policy being stated in exact terms to be "the gradual suppression and final prohibition" of monastic orders in this land, and the statutes which state that policy standing unrepealed and being still the law of the land.

There is no indication in this gift of any charity according to the law of England. It is nothing but a gift to an illegal society

(1) [1906] 1 I. R. 539.

without specifying the purposes for which it is intended to be used, and the gift is void.

There is no question of a perpetuity.

[*In re Amos* (1), *In re Cranston* (2), and *In re Slatter* (3) were also referred to.]

Norton, K.C., *T. Healy, K.C.*, and *Tomlin, K.C.*, for the Franciscan Friars. This is a gift to the individual Franciscans who happened to be banded together at Clevedon at the particular time of the testator's death. That is the true construction of this will. *Cocks* v. *Manners* (4) is indistinguishable from the present case. That case was followed in *In re Wilkinson's Trusts* (5) and *Bradshaw* v. *Jackman.* (6) It is not the less a gift to individuals because those individuals will not in fact, though they can, spend it, but will choose to hand it on to future members. This is the first case which has come before the Courts divorced from any consideration of a religious trust, and is rather a question of fact than of law—it is whether the gift is to individuals or to a society as a corporate or quasi-corporate body. If the bequest were to other than persons bound by monastic or religious vows, there could be no question about its validity. A gift to a society is a gift to the individuals composing the society: *In re Clarke.* (7) Once admit its validity as a gift to individuals, the fact that they are described as Franciscans is immaterial. If the gift is otherwise valid, there is nothing in the Roman Catholic Relief Act, 1829, which renders it invalid. The fact that the donees are misdemeanants cannot make any difference. Sect. 23 of the Act means that Roman Catholics can hold real and personal property just as any one else. The Act does not make the Franciscan Order or the six Franciscan Friars at Clevedon an illegal community or society at all. The Act is aimed at the individual, not at the community. It was simply passed to prevent individual Franciscans from remaining or coming within the realm, and meant to effect that object by means of declaring them misdemeanants and providing particular statutory punishments. There is nothing in the statute which says that the Franciscan Order or six Franciscans forming a society or institution at a particular place is or are illegal. In the preamble of s. 28 it is doubtful if "the same" means the "orders, communities, or societies," or the individuals of whom those orders, communities, or societies are composed. The preamble is the only statement that the Legislature has determined to suppress and prohibit "the same" by means which are stated in the statute and by those means only. If those provisions had been carried out there would now be no Roman "regulars" in the country. But as the Legislature has not put those means into force, matters remain as they were, and those against whom the statute is aimed can do what any other individuals can. The crime goes with the sanction. There is no further inability and no other punishment can be inflicted. The preamble has not been fulfilled: Lilly and Wallis' Manual of the Law specially affecting Catholics, p. 46. All that the Act has done is to say that certain individuals have become misdemeanants. A person who has committed misdemeanours can nevertheless take legacies or lands. Suppose a testator were to say "I give 100*l.* to those well-known poachers on my estate, whose names I do not know," it would be a perfectly valid gift. So would a gift to a bank or a company which had not fulfilled the statutory requirements; or a gift to a trade union before the enabling Acts, at a time when trade unions were regarded as illegal as being in restraint of trade. The position of inchoate offenders or misdemeanants under the Roman Catholic Relief Act, 1829, is a fortiori a more favourable one, as to the right to hold property, than that of convicts under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23). The Act of 1829 having only required existing orders to be registered, not to be turned out, and recognizing existing members of societies for their lives, a gift made in 1830 would have been valid. It is absurd to say that a gift which for a limited period would have been valid ceased to be a valid gift at some uncertain time. The Irish Courts have held that a gift to an individual Franciscan is valid. After that it is difficult to see how the series of Irish cases cited on the other side can stand. The reasons for the stringency of the Irish cases must be sought in, and rests on, the concluding words—"any member or members thereof"—of s. 15 of the Charitable Donations and Bequests (Ireland) Act, 1844, which no doubt pressed upon the judges in Ireland, but the Act does not obtain here. If a gift to one Franciscan is valid, a gift to two or six must be valid, and not the less because they live together in the same house and are called a society or institution.

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(1) [1891] 3 Ch. 159.

(2) [1898] 1 I. R. 431.

(3) (1905) 21 Times L. R. 295.

(4) L. R. 12 Eq. 574.

(5) (1887) 19 L. R. Ir. 531.

(6) (1887) 21 L. R. Ir. 12.

(7) [1901] 2 Ch. 110.

As to the Irish cases—*Sims* v. *Quinlan* (1), *Walsh* v. *Walsh* (2), *Kehoe* v. *Wilson* (3), *Carbery* v. *Cox* (4), *Liston* v. *Keegan* (5), *Murphy* v. *Cheevers* (6), *Roche* v. *M'Dermott* (7), and *Burke* v. *Power* (8) are distinguishable. How the step, from applying the provisions of the Act of 1829 to making gifts invalid, is taken in those cases does not appear. The cases, before the decision of *Cocks* v. *Manners* (9), proceed on the wrong principle of *Sims* v. *Quinlan* (1) that a community of Franciscans is illegal. *Sims* v. *Quinlan* (1) had not decided that, but that a gift for the purpose of bringing into the order express persons was illegal. When the decision of *Cocks v. Manners* (9) was taken over from England to Ireland by Lord Ashbourne L.C. and brought to the notice of the Irish Courts, it was then decided in one or two cases—*In re Wilkinson's Trusts* (10) and *Bradshaw* v. *Jackman* (11)—that a gift to a convent was a gift to individuals and valid. In *Cussen* v. *Hynes* (12) only, it was thought, upon the construction of a particular will, that a gift to a convent was not a gift to individuals; and *In re Wilkinson's Trusts* (10) and *Bradshaw* v. *Jackman* (11) were distinguished. *Cocks* v. *Manners* (9) is binding here, and this Court will hold that the gift is to the members of the community as individuals, and all they have to do is to put it in the common chest and, if they please, divide it. As to any ecclesiastical argument against the gift on the ground that the Franciscan vow is partly one of poverty, the answer is that the Pope, who alone can take cognizance of it, has released the friars from that part of the vow.

(1) 17 Ir. Ch. Rep. 43.
(2) I. R. 4 Eq. 396.
(3) 7 L. R. Ir. 10.
(4) (1852) 3 Ir. Ch. Rep. 231.
(5) 9 L. R. Ir. 531.
(6) 17 L. R. Ir. 205.
(7) [1901] 1 I. R. 394.
(8) [1905] 1 I. R. 119.
(9) L. R. 12 Eq. 574.
(10) 19 L. R. Ir. 531.
(11) 21 L. R. Ir. 12.
(12) [1906] 1 I. R. 539.

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Hughes, K.C., in reply. A gift to individuals is the last thing the testator dreamed of. It is a gift to a community bound by rules, to be dealt with under the authority or direction of the Roman Catholic authorities. The step from a community being illegal to a gift to it being illegal is perfectly simple. It is the reason of the Irish cases. *Cussen* v. *Hynes* (1), where the cases are cited, is a sound decision. A gift to an amalgamated society of poachers, or to a society amalgamated for the purpose of the murder of the Sovereign, or for gambling or other illegal purpose, must be invalid: *Thrupp* v. *Collett.* (2) A gift which, as here, is calculated to encourage what is prohibited by law is void.

Cur. adv. vult.

March 18. JOYCE J. The testator in this case, after giving various legacies and an annuity, directed his trustees to hold the residue of his estate "in trust for the society or institution known as the Franciscan Friars of Clevedon in the county of Somerset absolutely"; and declared that the receipt of the father guardian or other proper officer for the time being of the said Franciscan Friars should be a sufficient discharge for any payments made to them. At the date of the will, 1906, and also at the date of the testator's death, there was at Clevedon a society or community, which is probably the more appropriate word, of Franciscan Friars; and it was undoubtedly this community that was intended and referred to by the testator as "the society or institution known as the Franciscan Friars at Clevedon." This word "institution" was also used in the will in *Cocks* v. *Manners* (3) as well of (1.) the Dominican convent at Carisbrook as of (2.) the sisters of charity of St. Paul at Selley Oak; bequests to each of which were held to be valid, with an exception as to real estate which is immaterial on the present occasion.

The bequest in the present case is claimed by the members of the Clevedon community of Franciscan Friars at the time of the testator's death. They are persons who had each taken upon himself, but of course was in no way legally bound by, certain monastic vows. Their claim is disputed by the testator's heir-at-law and next of kin, who contend that the bequest, although not obnoxious to any express statutory provision, is invalid and void by reason of something which is termed the policy of the statute, or of some sections of the statute, of 1829, commonly known and referred to as the Roman Catholic Emancipation Act.

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(1) [1906] 1 I. R. 539.

(2) (1858) 26 Beav. 125.

(3) L. R. 12 Eq. 574.

It was agreed on both sides that there is no question of a charitable trust here, particular or general; and that the bequest was not open to objection upon the ground that it would create, or tend to create, a perpetuity. There is no direction to apply the income for ever, or for an indefinite period, to any particular purpose; nor is there any direction whatever in reference to the application of the corpus. The bequest is expressed to be for the society absolutely. The objection, and the only objection, raised was founded upon the policy or supposed policy of the Roman Catholic Emancipation Act, or the sections thereof that I have mentioned, aimed at the ultimate suppression of Jesuits and other monastic or religious orders of men in the United Kingdom.

These sections are numbered from 28 to 37. The 28th section recites: "And whereas Jesuits, and members of other Religious Orders, Communities, or Societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom; and it is expedient to make provision for the gradual suppression and final prohibition of the same therein." Then it provides, reading it shortly, that Jesuits and members of other religious orders of the Church of Rome now in the United Kingdom shall sign and deliver to the clerk of the peace a notice in the form in the schedule. Then the marginal note of s. 29 is "Jesuits, &c., coming into the realm, to be banished." The note to s. 30 is "Natural-born subjects, being Jesuits, may return into the kingdom and be registered." Then s. 31 provides that licences may be granted to Jesuits, &c., to come into the kingdom for a limited time; and that the same may be revoked. Then (marginal note to s. 32) "Accounts of licences to be laid before Parliament." "Admitting persons as members of such religious orders"—of course within the jurisdiction—"deemed a misdemeanor" (s. 33). "Any person so admitted a member of a religious order to be banished" (s. 34). Then s. 35 provides that persons not departing after that sentence of banishment may be removed, "and if at large after three months, may be transported for life" (s. 36). Then s. 37, for some reason or other, provides: "Nothing herein contained shall extend or be construed to extend in any manner to affect any Religious Order, Community, or Establishment consisting of females bound by religious or monastic vows." That exception must be borne in mind, because, in the case of *Cocks* v. *Manners* (1) already mentioned, the argument addressed to me in the present case upon the policy of the Act, or on these sections, was not admissible because both the Dominican convent at Carisbrook and, of course, the sisters of charity of St. Paul at Selley Oak were communities of ladies, and, therefore, exempt from the operation of the sections I have mentioned.

This doctrine of the policy of a statute or public policy, never had recourse to until all other arguments have failed, has been quaintly characterized on various occasions, e.g. by Burrough J. in *Richardson* v. *Mellish* (2), as "a very unruly horse," and by A. L. Smith M.R. in *Driefontein Consolidated Mines* v. *Janson* (3) as "a high horse to mount and difficult to ride when you have mounted it." In the case of the Roman Catholic Emancipation Act the sections relied upon here by the next of kin and heir-at-law have never been enforced. They are, as they have been from the first, and will no doubt remain, a dead letter. What legal force and effect then ought now properly to be attributed to these sections, or to what is called the policy of the Act? Such policy has never been recognized by any Court in this country. As was pointed out to me by Mr. Healy, the supposed policy of these sections could not possibly have invalidated immediate and absolute bequests, under the will of a testator dying soon, or say less than six months, after the passing of the Act. At the same time, even now, I am not prepared confidently to deny that a bequest expressly directed to be applied in maintaining Jesuits or one of the forbidden orders at a particular place, or generally in the United Kingdom, might not be void on the same principle as the legacy in what is known as the poachers' case—*Thrupp* v. *Collett* (1)—which it was considered would operate as an encouragement to persons to commit misdemeanours in the future. In that case the bequest was actually to pay the fines of poachers who had been convicted at the death of the testator, or should be convicted within five years afterwards.

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(1) L. R. 12 Eq. 574.

(2) (1824) 2 Bing. 229, 252.

(3) (1901) 17 Times L. R. 604, 605.

These anti-monastic sections, taken in their widest possible sense, do not place the offender, even if and when convicted, in the position of an outlaw; or disqualify him from taking, by conveyance or assignment inter vivos or by will, or from holding any property, even real estate, in this country. A felon, who by the way cannot be treated as such before conviction, is not now so disqualified; and at no time in the history of this country did the circumstance that a person had committed, or was supposed to be committing, a misdemeanour disqualify him from taking or holding property of any kind here; nor do I understand how any one could be treated as being guilty of a criminal offence, unless or until he had been convicted. Upon any prosecution under this Act, it is impossible for me to say what defences might not be raised. I am not at all sure, after the failure of the attempt in *Rex* v. *Kennedy* (2), that some ingenious defence might not be found, and a conviction not obtained. And upon consideration, I venture to think that the argument which has been addressed to me, founded upon the so-called policy of the Roman Catholic Emancipation Act, is not really relevant to the case.

There have been decisions in Ireland to the effect—these are not the Irish decisions which have been particularly referred to, but some others—that a bequest not charitable to an unincorporated society or association is absolutely void, because the legatee, not being a person in law, has no legal capacity, and is incapable of taking property. These decisions, however, as Mr. Theobald points out in his Law of Wills, 7th ed. at pp. 117, 118, cannot now be considered as law—indeed are overruled. No doubt,

(1) 26 Beav. 125.

(2) 86 L. T. 753.

excluding cases of charitable bequests, a legatee must be either a natural person, or a corporation; but legacies to various unincorporated associations—for instance, a musical society: *In re Alsopp's Estate* (1); the committee for the time being of the Corps of Commissionaires: *In re Clarke* (2), and other instances have been given—were held to be perfectly good; because the Courts consider the persons of whom the society or association is composed to be the legatees—the named society or association being in truth only a compendious or conventional designation for the aggregate of the members.

In this country a partnership firm is not a person in law; and, if a legacy be left to a firm, it is payable, unless otherwise expressed or directed, to the individuals who compose the firm: see Lindley on Partnership, 8th ed. p. 139. An assignment or conveyance by deed expressed to be made to a firm, or to a non-existent or imaginary person under the style of whose name a partnership business may be carried on, is held to be an assignment or conveyance to the several individuals who compose the firm or carry on business under the style of the non-existent person as joint tenants: see *Maugham* v. *Sharpe* (3) and *Wray* v. *Wray*. (4) So in my opinion a bequest to any unincorporated society or association not charitable is good because, and only because, it is treated as being and is a bequest to the several members of such society or association, who can spend the money as they please. If there should be any understanding, or even contract, between these persons as to how the moneys so derived, that is from legacies, are to be expended, that is something with which in the absence of any express trust or direction in the will the executors who pay the legacy have nothing whatever to do. Indeed it was not, I think, contended before me that a bequest of an immediate absolute legacy to a member or to each of the members of the community of the Franciscans at Clevedon at the time of the testator's death would not be perfectly good. How can the policy of the Act, whatever it may be, invalidate a simple absolute immediate bequest to an individual or individuals?

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(1) (1884) 1 Times L. R. 4.

(2) [1901] 2 Ch. 110.

(3) (1864) 17 C. B. (N.S.) 443, 462, 463.

(4) [1905] 2 Ch. 349.

A bequest to each of the members of the community would be to a person or persons each as competent to take as any other ordinary individual, and entitled to spend the money as he or they pleased.

If I am right in the view which I entertain that the bequest here is to the members of the community, who may spend the money as they please, the argument addressed to me founded upon the alleged policy of the later sections of the Roman Catholic Emancipation Act does not, in my opinion, apply. My attention was called to a great number of decisions in Ireland rightly enough, but I must say that upon examination of those cases there are very few of them which really have anything to do with the present case. *Sims* v. *Quinlan* (1) was treated as a leading case. There it was held that a bequest to two Roman Catholic priests to be applied for the education and maintenance of two priests of the Order of St. Dominic in Ireland was for an application in future and, if anything, was a charity, and, much as in the poaching case, that it might be encouraging or preparing persons to violate the particular sections I have mentioned of the Roman Catholic Emancipation Act. In the same case it was decided that a legacy to a priest upon a secret trust for the redemption of the rents of a Roman Catholic church in Cork, held by Dominican monks as trustees and used as one of the principal places of Roman Catholic worship in that city, was void. This may or may not be perfectly sound, but in neither part of it is the case in any way similar to the one before me; neither of the bequests in *Sims* v. *Quinlan* (1) is of the same class as the one I have to consider. No doubt it is true that the first part has been followed in Ireland in *Cussen* v. *Hynes* (2), where the legacy of 300*l.* to the superior of a Franciscan convent to educate a priest for that community was held to be void. That is following the first part of *Sims* v. *Quinlan* (1), in reference to a fund directed to be applied to something which was really a charity. Also in *MacLaughlin* v. *Campbell* (3) there was a bequest for the establishment at a certain place of a community of Christian brothers.

(1) 17 Ir. Ch. Rep. 43.

(2) [1906] 1 I. R. 539.

(3) [1906] 1 I. R. 588.

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That was held to be void. That was something to be done in the future, and, if anything, was a charity.

The second part of the decision in *Sims* v. *Quinlan* (1) was in reference to a secret trust to redeem the ground rent of a Roman Catholic chapel held by Dominicans as trustees but used as a public place of worship. That has nothing to do with our case. It has been followed in two others. A bequest to be used in the repair or rebuilding of particular churches, although public, was held to be for the benefit of the monastic orders in *Kehoe* v. *Wilson* (2); and in *Liston* v. *Keegan* (3) a trust for the benefit of a church belonging to the Society of St. Vincent de Paul, coming into the United Kingdom after the Act, was held to be void; that was also a trust for the benefit of a church. I must say I should think these decisions about churches very doubtful, but, however that may be, they have no application to the present case.

No doubt in *Walsh* v. *Walsh* (4), which was in 1869, Chatterton V.-C.—and it is singular that nearly all the decisions against the validity of these bequests are the Vice-Chancellor's—held that a legacy of 30*l.* to a named person H. for the use of the Franciscan convent at Wexford was void. The only judgment is this: " With respect to the bequest of 30*l.* for the use of the Franciscan convent, it is clearly void, and I shall make a declaration to that effect." That is all he says. The argument was that it was void because of the decision in *Sims* v. *Quinlan.* (1) In my opinion the decision in *Sims* v. *Quinlan* (1) had nothing whatever to do with the case; and it was before the decision in *Cocks* v. *Manners.* (5) In *Morrow* v. *M'Conville* (6), which is again a decision of the Vice-Chancellor, a legacy to be applied for the use and benefit of the Roman Catholic convent of St. Joseph was held to be void. A part of this decision is undoubtedly overruled, as Mr. Theobald says in his Law of Wills, 7th ed. at p. 117, but the Vice-Chancellor expressly declined to follow *Cocks* v. *Manners* (5), which is certainly binding on me. In *Murphy* v. *Cheevers* (7)—

(1) 17 Ir. Ch. Rep. 43.
(2) 7 L. R. Ir. 10, 17.
(3) 9 L. R. Ir. 531.
(4) I. R. 4 Eq. 396, 404.
(5) L. R. 12 Eq. 574.
(6) 11 L. R. Ir. 236.
(7) 17 L. R. Ir. 205, 209.

it is a decision of Chatterton V.-C. again—a legacy to the Christian Brothers at Cork was held to be void because as it was said the Brothers "could not be restricted in any way in application of the money and therefore it might be applied for the benefit of the order." That is a very strange decision to my mind; and *Cocks* v. *Manners* (1) was not cited.

In *Burke* v. *Power* (2) there was a bequest to the Franciscan Friars—I suppose it was at some particular place—for the purpose of having masses said for the repose of the soul of the testator in two particular named places. This was argued to be bad on the authority of *Sims* v. *Quinlan* (3), which obviously had nothing whatever to do with it, and all the judgment says is that it is clearly void under the statute. I cannot see it.

In *Cussen* v. *Hynes* (4) two things were decided. It was a case of the Franciscans. The bequest was "to the superior of Holy Trinity a legacy of 100*l.* for that community." Barton J. said it was for the members and held it to be good. That was reversed by the Court of Appeal, *Cocks* v. *Manners* (1) not being cited, and the Court saying that it fell under the words and policy of the Act.

Still, notwithstanding these decisions, in *Carbery* v. *Cox* (5) an annuity to the monks of Shandon to provide clothing for the poor children attending their schools was held to be good, and the Lord Chancellor directed it to be ascertained who were the individuals described at the testator's death, and ordered payment to be made to them with a scheme. In *In re Wilkinson's Trusts* (6), which I am not forgetting was a case of ladies, the gift was to the superioress of a convent for the purposes solely of the convent. The Court of Appeal, approving *Cocks* v. *Manners* (1), reversed the decision of the Vice-Chancellor, who had held it to be void. In *Bradshaw* v. *Jackman* (7) it was held by the Master of the Rolls that a trust for the community of a convent meant the persons at the time who were members and was a valid bequest to individuals. In *Roche* v. *M'Dermott* (8) a bequest to

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(1) L. R. 12 Eq. 574.
(2) [1905] 1 I. R. 119.
(3) 17 Ir. Ch. Rep. 43.
(4) [1906] 1 I. R. 539.
(5) 3 Ir. Ch. Rep. 231.
(6) 19 L. R. Ir. 531.
(7) 21 L. R. Ir. 12.
(8) [1901] 1 I. R. 394.

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the rector of Jesuits at M. in aid of the school there for the training of pupils intended for the Church was held to be valid; but that has nothing to do with our case. There the application was directed, but still it was held to be valid. I ought to have said that *Bradshaw* v. *Jackman* (1) was a case of ladies too. It was not a case of monks. In *In re Murphy* (2) a bequest "to the superior of the Franciscan Capuchin Order at Rochestown in aid of the school there for the education of priests"—for foreign missions and foreign service, I admit—was held not to be invalid.

Upon the whole the Irish cases—which I am not bound to follow—are to my mind far from satisfactory. My conclusion is that I follow *Cocks* v. *Manners* (3); that the bequest in question here is a gift to the several members of the community of Franciscans at Clevedon at the date of the testator's death; that the policy of the Act has no operation upon a simple immediate absolute bequest to individuals ascertained at the death of the testator; in other words, I hold this legacy to be perfectly valid.

Solicitors: *L. L. M. Marsden; W. Silverwood Cope; Blount, Lynch & Petre.*

NOTE.—Roman Catholic Relief Act, 1829, s. 28: "'And whereas Jesuits, and members of other Religious Orders, Communities, or Societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom; and it is expedient to make provision for the gradual suppression and final prohibition of the same therein'; Be it therefore enacted, that every Jesuit, and every member of any other Religious Order, Community, or Society of the Church of Rome, bound by monastic or religious vows, who at the time of the commencement of this Act shall be within the United Kingdom, shall, within six calendar months after the commencement of this Act, deliver to the Clerk of the Peace of the county or place where such person shall reside, or to his deputy, a notice or statement, in the form and containing the particulars required to be set forth in the schedule to this Act annexed; . . . . and in case any person shall offend in the premises, he shall forfeit and pay to His Majesty, for every calendar month during which he shall remain in the United Kingdom without having delivered such notice or statement as is hereinbefore required, the sum of fifty pounds."

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(1) 21 L. R. Ir. 12.

(2) [1906] 1 I. R. 505.

(3) L. R. 12 Eq. 574.

Sect. 29. "And . . . . if any Jesuit, or member of any such Religious Order, Community, or Society . . . . , shall, after the commencement of this Act, come into this Realm, he shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished . . . ."

Sect. 30. "Provided always . . . . That in case any natural-born subject of this Realm, being at the time of the commencement of this Act a Jesuit, or other member of any such Religious Order, Community, or Society . . . . , shall, at the time of the commencement of this Act, be out of the Realm, it shall be lawful for such person to return or to come into this Realm; . . . ."

Sect. 31. "Provided also, ... That . . . . it shall be lawful for any one of His Majesty's principal Secretaries of State, being a Protestant, by a licence in writing, signed by him, to grant permission to any Jesuit, or member of any such Religious Order, Community, or Society . . . . , to come into the United Kingdom, and to remain therein for such period as the said Secretary of State shall think proper, not exceeding in any case the space of six calendar months; and . . . . to revoke any licence so granted . . . ."

Sect. 33. "And . . . . in case any Jesuit, or member of any such Religious Order, Community, or Society . . . . , shall, after the commencement of this Act, within any part of the United Kingdom, admit any person to become a Regular Ecclesiastic, or Brother or member of any such Religious Order, Community, or Society, ... every person offending in the premises in England or Ireland shall be deemed guilty of a misdemeanor, and in Scotland shall be punished by fine and imprisonment."

Sect. 34. "And . . . . in case any person shall, after the commencement of this Act, within any part of this United Kingdom, be admitted or become a Jesuit, or Brother or member of any other such Religious Order, Community, or Society . . . . , such person shall be deemed . . . . to be guilty of a misdemeanor, and being . . . . convicted shall be . . . . ordered to be banished . . . ."

Sect. 35. "And . . . . in case any person sentenced and ordered to be banished . . . . shall not depart from the United Kingdom within thirty days after the pronouncing of such sentence and order, it shall be lawful for His Majesty to cause such person to be conveyed to such place out of the United Kingdom as His Majesty . . . . shall direct."

Sect. 36. "And . . . . if any offender, who shall be so sentenced and ordered to be banished . . . . , shall, after the end of three calendar months . . . . , be at large . . . . , without some lawful cause, every such offender . . . . , on being . . . . convicted, shall be transported . . . ."

Sect. 37. "Provided always . . . . That nothing herein contained shall extend or be construed to extend in any manner to affect any Religious Order, Community, or Establishment consisting of females bound by religious or monastic vows."

A. L.

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In re CROMPTON & CO., LIMITED.
PLAYER *v.* CROMPTON & CO., LIMITED.

[1914 C. 257.]

Company—Debenture—Floating Security—Covenant for Payment on Specified Day—Winding up of Company before such Day—Debenture-holders' Action—Appointment of Receiver.

In 1895 a company issued a series of debentures of 100*l.* each to secure the aggregate principal sum of 100,000*l.* The debentures, which were all in the same form, provided that the company would on January 1, 1920, or on such earlier day as the principal moneys thereby secured should become payable in accordance with the conditions indorsed thereon, pay to the registered holder the sum of 100*l.* with interest thereon as therein mentioned. The conditions provided that the principal moneys thereby secured should become immediately payable (inter alia) if an order was made or an effective resolution was passed for winding up the company otherwise than for the purposes of reorganization, reconstruction, or amalgamation. The debentures were secured by a trust deed which contained a similar provision. The combined effect of the debentures and the trust deed was to give a floating charge on all the assets. In June, 1913, the company passed a resolution for winding up for the purposes of reconstruction, and subsequently the assets of the company were transferred to a new company which had been incorporated for the purpose of taking them over. Two debenture-holders brought an action on behalf of themselves and all other holders of debentures in the old company to have the trusts of the trust deed carried into execution under the order of the Court. On an application by the plaintiffs for the appointment of a receiver:—

Held, that when the business of the transferor company came to an end by the winding up the security ceased to be a floating security of that company; that the debentures then became payable and the security became enforceable; and that the plaintiffs were entitled to the appointment of a receiver notwithstanding the provisions in the debentures and trust deed with reference to winding up for the purposes of reconstruction.

Hodson v. *Tea Co.* (1880) 14 Ch. D. 859 and *Wallace* v. *Universal Automatic Machines Co.* [1894] 2 Ch. 547 followed and applied.

MOTION.

Crompton & Co., Limited, was incorporated in 1888.

In 1895 the company issued a series of debentures of 100*l.* each to secure the aggregate principal sum of 100,000*l.*

The debentures, which were all in the same form, provided that the company would on January 1, 1920, or on such earlier day as the principal moneys thereby secured should become payable in accordance with the conditions indorsed thereon, pay to the registered holder 100*l.* and interest in the meantime at 5 per cent. per annum, and the company thereby charged with such payment all its property whatsoever and wheresoever both present and future except such parts thereof as were included in a certain trust deed dated January 26, 1895.

The material conditions were the following :—

1. " This debenture is one of a series of 1000 debentures for securing the total principal sum of 100,000*l.* issued or about to be issued by the company, and all ranking pari passu as a first charge on the undertaking and property of the company, subject nevertheless as mentioned in the indenture hereinafter referred to."

8. " The holders of the debentures of this issue are and will be entitled, pari passu, to the benefit of an indenture dated the 26th day of January, 1895, and made between the company of the one part and " two trustees therein named " of the other part, whereby certain property was vested or intended to be vested in trustees for securing the payment of the principal moneys and interest payable in respect of the debentures."

10. " The principal moneys hereby secured shall become immediately payable (*a*) if the company makes default in payment of any interest " as therein specified ; " or (*b*) if an order is made or an effective resolution is passed for winding up the company, otherwise than for the purposes of reorganization, reconstruction or amalgamation ; or (*c*) if an order is made appointing a receiver of the property or undertaking of the company, but until such an order is made, or such resolution is passed, the company may, for the purposes of its business, dispose or deal with any of the property hereby charged in accordance with the regulations for the time being of the company, but not so as to create any mortgage or charge on any such property, in priority to or concurrently with the said debentures."

The trust deed of January 26, 1895, referred to in the debentures was made between the company of the one part and two trustees of the other part, and recited the issue of the debentures and other matters not material to be here stated, and by it the company as beneficial owner granted to the trustees certain hereditaments specified in the first two schedules to the deed, demised to them certain leasehold premises, and assigned unto them all interest of the company in certain letters patent and "all the personal property (excepting personal chattels within the meaning of the Bills of Sale Acts, but including capital not called up, and calls made and unpaid, and the goodwill of the said business, and trade debts, and other choses in action) of or to which the company now is, or during the continuance of this security shall become possessed or entitled, together with full power to the" trustees to demand, sue for, recover and give discharges for all or any of the debts, moneys, and choses in action included in the assignment. Clause 6 provided that "the mortgaged premises . . . . shall be held by the trustees upon trust for securing to the registered holders of the said debentures for £100,000 so intended to be issued as aforesaid, or so many thereof as shall for the time being be outstanding, without preference or priority, the payment of the principal moneys and interest payable thereon in manner following (that is to say) upon trust that the trustees shall permit the company to hold and enjoy all the mortgaged premises, and to carry on therein and therewith the business, or any of the businesses, authorized by the memorandum of association of the company, and to call up and receive any of its capital until the security hereby constituted becomes enforceable as hereinafter provided," and then upon trust that upon certain requisitions and in their discretion the trustees should sell as therein provided. By clause 7, "Subject to the provisions hereinafter contained, the security hereby constituted shall become enforceable in each and every of the events following": (*a*) if certain defaults should be made; "(*b*) if an order shall be made, or an effective resolution shall be passed for the winding up of the company otherwise than for the purposes of reorganization, reconstruction or amalgamation; (*c*) if and whenever a distress shall be levied on, or an execution issued against, any of the chattels or property of the company, or an order shall be made appointing a receiver of the undertaking and property of the company; (*d*) if and whenever the company shall commit a breach of any covenant herein contained." Clause 20 provided that "The trustees may from time to time waive on such terms and conditions as they shall think fit any breach by the company of any of the covenants and provisoes herein contained. Provided such breach does not in the opinion of the trustees substantially prejudice the security hereby created." By clause 29 the company covenanted (inter alia) that it would "during the continuance of this security, carry on and conduct the business of the company to the greatest possible advantage." By clause 35, "The holders of three-fourths in value of the debentures may, by writing under their hands, from time to time assent" to certain modifications of the rights of the debenture-holders.

In June, 1913, the company passed a resolution for the voluntary winding up of the company for the purposes of reconstruction, and subsequently the business and assets of the company were transferred to a new company of the same name which had been incorporated for the purpose of taking over the business and assets of the old company.

The new company, since taking over the assets of the old company, had executed a supplemental trust deed dated November 17, 1913, whereby it had given to the debenture-holders of the old company by way of further security a specific charge upon certain assets not included in the original trust deed and had also created a new floating charge on the assets of the new company. That arrangement had been accepted by the bulk of the debenture-holders of the old company. There was, however, a minority of the debenture-holders who contended that they were not bound by the arrangement. The sole surviving trustee of the deed of January 26, 1895, had executed a waiver of breaches of covenant by the company.

The plaintiffs, who were two joint holders of twenty debentures in the old company, brought the present action on behalf of themselves and all other holders of debentures in the old company against the old company, the trustee of the deed of January 26, 1895, and the new company, claiming (inter alia) (1.) an account, (2.) to have the trusts of the deed carried into execution under the order of the Court, and (3.) to have a receiver and manager appointed of the property comprised in the deed.

The plaintiffs now moved for the appointment of a receiver and manager.

Clauson, K.C., and *J. F. Carr*, for the motion. The plaintiffs are entitled to maintain an action for the realization of their security and for the appointment of a receiver. It is true that under the conditions of the debentures the principal moneys have not become payable, but the effect of the liquidation, although for the purposes of reconstruction, is to put an end to the floating security. The undertaking on the security of which the money was borrowed has come to an end by the winding up, and this circumstance entitles the debenture-holders to realize their security at once: *Wallace* v. *Universal Automatic Machines Co.* (1); *Hodson* v. *Tea Co.* (2) The trust deed of 1895 in clause 29 contains an express covenant by the old company to carry on business, which means the business of the old company, and that is not a covenant the continuing breach of which can be effectively waived under clause 20. The business cannot be carried on in conformity with the trust deed, and it is inconsistent with the very notion of a floating charge that it should continue after the undertaking in question ceases to be a going concern: per Lord Macnaghten in *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (3)

[They were stopped.]

Younger, K.C., *Gore-Browne, K.C.*, and *H. E. Wright*, for the company. The rights of the plaintiffs are a pure matter of contract, and they are entitled to no relief according to the terms of their contract. The covenant for payment in the debentures is to pay on July 1, 1920, or at some earlier date in certain events none of which has yet happened, and the security, whether on the specific property or by way of floating charge, is created for the purpose of satisfying that obligation and no other, and unless it can be shewn that the security is in jeopardy (which is not the case here) there is no ground for relief. The

(1) [1894] 2 Ch. 547.
(2) 14 Ch. D. 859.
(3) [1897] A. C. 81, 86.

objection that the business is now being carried on by a company substituted for the old company is purely technical. *In re South African Supply and Cold Storage Co.* (1) shews that the word "reconstruction" in this connection is a commercial and not a legal term, involving, as Buckley J. there points out, no more than this, "that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company." *Hodson* v. *Tea Co.* (2) and *Wallace* v. *Universal Automatic Machines Co.* (3) are distinguishable. In those cases the winding up put an end to any chance of the undertaking producing any further profits and the security was in jeopardy. They did not decide that a debenture-holder was entitled to a receiver as a matter of contract.

[WARRINGTON J. The jurisdiction to appoint a receiver arises when the security ceases to be a floating security.]

The principal moneys would not become immediately payable upon the appointment of a receiver unless it was so provided by the trust deed. The inherent right of the Court to protect the assets does not depend on the security becoming enforceable or on its ceasing to be a floating security. There is no reason why a floating charge should not attach to the business and into whosesoever hands it may come. The fruit of the tree follows the tree. The business continues subject to the charge whoever may carry it on. The assets may be used for creating new assets which will be covered by the charge. The words in the trust deed cannot be satisfied unless the charge covers the assets in the hands of the new owner of the business, namely, the reconstructed company. The assets passed to the new company, subject to the floating charge. In *In re Borax Co.* (4) it was held that what was originally charged passed to the new company. While there is a continuing business to which the charge can attach there is no reason why it should not be a security for the debenture-holders in the present case. The charge given by the debentures and by the trust deed is on the business and not on the company. It may be a very serious matter for the new company if the Court holds that the security has crystallized by the appointment of a receiver and it subsequently turns out at the trial that the receiver ought not to have been appointed. It is submitted that such an appointment ought not to be made on an interlocutory application.

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(1) [1904] 2 Ch. 268, 286.

(2) 14 Ch. D. 859.

(3) [1894] 2 Ch. 547.

(4) [1901] 1 Ch. 326.

Douglas Hogg, for the sole surviving trustee of the trust deed of January 26, 1895.

Clauson, K.C., in reply.

[WARRINGTON J. What do you say as to the argument that I ought not to appoint a receiver on an interlocutory application?]

When a debenture-holder's charge crystallizes the debenture-holder is entitled to have his security protected at once, and that is done by the appointment of a receiver. The debentures in the present case might have imposed on the debenture-holders a condition that they should novate, but they did not do so. Nothing can be clearer than condition 10 of the debentures. The only licence thereby given is to the old company to trade notwithstanding the charge. The licence only authorizes the company to carry on the business; it does not authorize it to transfer to a new company the right to carry on the business. The debenture-holders have an immediate charge notwithstanding the postponement of payment of the principal moneys, and that entitles them to the appointment of a receiver.

[WARRINGTON J. The strongest expression in your favour is in *Hodson* v. *Tea Co.*(1)]

It is for the defendants to shew not only that the new company is entitled to carry on the business, but that the old company can transfer the assets to another company and enable that company to carry on the business under the trustees' and debenture-holders' licence.

WARRINGTON J. This action is a debenture-holders' action and the motion is a motion of an ordinary nature for the appointment of a receiver. The question is whether the plaintiffs are entitled

(1) 14 Ch. D. 859, 862.

to maintain an action for the realization of their security so far as the debentures are concerned and for the execution of the trusts of the trust deed with the view of the realization of their security so far as that is concerned. The defence is that the money secured by the debentures is not payable and that no event has happened putting the plaintiffs into the position of being entitled to realize their security. [His Lordship stated the facts and continued :]

January 1, 1920, has not arrived, nor have at present any of the events specifically mentioned either in the debenture or in the trust deed occurred. But the plaintiffs say that the effect of the winding up, notwithstanding that the winding up was for the purposes of reconstruction only, is that it in law crystallizes the security, which, until that time, was a floating security, and enables the plaintiffs to insist that they have an existing charge on certain defined assets—those existing at the time of the winding up—and entitles them to the realization of that charge.

Now there is no doubt about this, that in the absence of any stipulation in the debenture or in the trust deed to the contrary the winding up of the company which has issued debentures not yet payable under their terms entitles the holders of those debentures to the realization of their security. That question has twice come before the Courts, once before Hall V.-C. in *Hodson* v. *Tea Co.* (1) and again before the Court of Appeal in *Wallace* v. *Universal Automatic Machines Co.* (2) In *Hodson* v. *Tea Co.* (1) the debentures provided for payment at a time which had not arrived and created a floating security upon the assets of the company. Before the time when the principal moneys became due or interest had fallen into arrear the company went into liquidation, and the question arose whether, that being so, the debenture-holders were entitled to an immediate order for the realization of their security, or whether their rights were limited to a proof in the winding up. Hall V.-C. says (3) : "The argument"—that is, the argument on behalf of the company—"is that such a debenture-holder as the present must wait ; he may get paid, according to the terms of his debenture,

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(1) 14 Ch. D. 859.
(2) [1894] 2 Ch. 547.
(3) 14 Ch. D. 862.

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his interest on certain half-yearly days, and the capital in two or three years—it might have been in ten years, or in any other given number of years from the date of his debenture—but that being so he is to wait for payment unless he chooses to take the course which it has been suggested he might, of throwing up his security altogether, or of having his security valued, discounting in some way the payment which he is to receive." Then he answers that by saying: "It appears to me that, when a company comes to be wound up, the arrangement for the continuance of the loan for a certain time necessarily comes to an end—the money becomes immediately payable, and the security immediately enforceable." It is important to observe that the real ground upon which Hall V.-C. based his decision was that the contract for the postponement of payment was a conditional contract depending upon the fulfilment of the condition that the company which had issued the debenture should continue to carry on the business; that when that company came to be wound up that condition was necessarily not fulfilled, and that thereupon the money became immediately payable and the security realizable.

The same question came before the Court of Appeal in *Wallace* v. *Universal Automatic Machines Co.* (1) There again debentures had been issued by way of floating security. The debentures contained a covenant for payment of the principal on a specified day, without any stipulation making the money immediately payable in the event of a winding up. Winding up happened before the specified day, and the Court held that that event rendered the money immediately payable and entitled the debenture-holder at once to realize his security for the full amount of principal, interest, and costs. It had been said there, as it was said in *Hodson* v. *Tea Co.* (2), that the debenture-holder's right was to prove for his debt, that is either to give up his security and prove for the whole debt or to value his security and prove for the balance. Lindley L.J. in his judgment, in which Lopes L.J. concurred (3), says: "The plaintiff, however, is not seeking to prove his debt, nor is he bound to do so. On

(1) [1894] 2 Ch. 547.

(2) 14 Ch. D. 859.

(3) [1894] 2 Ch. 553.

the other hand, he is not content simply to rest on his security, nor is he content to have his interest kept down. He wants to realize his security and to apply its proceeds in paying off the principal and interest, although the time fixed for paying off the principal has not yet arrived. The undertaking, on the security of which the money was borrowed, has in fact come to an end by the winding-up; and this circumstance entitles the debenture-holders to realize their security at once." Then, referring to the decision in *Hodson* v. *Tea Co.* (1), he says: "The principle on which this decision is founded is, in my opinion, correct." Kay L.J. says (2): "It is material to observe that it is not a question of proof in the winding-up, but of realization of the security. By the winding-up order the position of the debenture-holders is very much altered. The subject of their security is, amongst other things, the undertaking; that is, the profit-producing concern. The winding-up practically puts an end to any chance of producing further profits. The security is a floating charge; that is, the company might use all its assets included in the security for the purposes of its bona fide business as though the charge did not exist. These powers are, to some extent, vested in the liquidator for the purposes of winding up the company. If the debenture-holders were compelled to wait until the debentures became due, the security might, and probably would, be very much depreciated in the meantime." Therefore all three members of the Court affirmed the principle laid down by Hall V.-C. in *Hodson* v. *Tea Co.* (1), and I think there can be no question at all that according to ordinary principles the winding up puts an end to the period of suspension; and the reason that it does that is that the effect of the winding up is to put an end to the floating nature of the security. Lord Macnaghten's well-known definition, or rather description, of a floating security is to be found in *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (3), and is this: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be

(1) 14 Ch. D. 859.

(2) [1894] 2 Ch. 554.

(3) [1897] A. C. 81, 86.

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from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes." Now a company which is being wound up ceases to carry on its business. That business ceases to be a going concern. It is no answer to say that where the winding up is for reconstruction only some one else comes in and carries on the business. The business carried on by that person is not the business charged by the debentures, and the assets acquired by him are not the assets charged by the debentures. The licence given by the debentures to the company to use the assets charged for the purposes of its business is not a licence to a new company to use those assets. The undertaking which is the subject-matter of the debentures comes to an end. Against that view it is said that in the present case, the question being of course to a great extent one of construction, the debentures and the trust deed not only do not specify winding up for the purposes of reconstruction only as one of the events on which the principal moneys are to become payable and the security enforceable, but exclude that event and provide in the negative that notwithstanding that a winding up has taken place, if it is for the purposes of reconstruction the security shall not be realizable. I have to consider whether it is possible to give that construction to these two documents. It seems to me quite impossible. What really has been done is to specify in the debentures and in the trust deed certain events which by law independently of stipulation would make the debenture realizable and to omit other events which also make the debenture realizable. Take the debenture itself. The debenture by condition 10, after specifying certain events, including resolutions to wind up otherwise than for the purposes of reorganization, reconstruction, or amalgamation, proceeds, "but until such an order is made, or such a resolution is passed"—that is, until a resolution otherwise than for reconstruction, &c., is passed—"the company may for the purposes of its business dispose or deal with any" of the assets. That is to say, it gives the company a certain limited licence to use its assets: but when a resolution is passed for reconstruction and the assets are transferred to a new company, which is the case here, that new company has no licence to use the assets for the purposes of its business. The old company has been wound up and does not use the assets; it has transferred them to another company, a new company, and the new company has no licence from the debenture-holders to use the assets. You cannot therefore give the construction contended for by the defendants to the conditions in question, because it is impossible to go further, which it would be necessary to do in order to make the suggested arrangement a sensible one, and say that in the event of reconstruction the new company shall be entitled to hold, and for the purpose of the business transferred to it to dispose or deal with, any of the property thereby charged, and not only that, but by some means or other to ensure that the floating security which the debenture-holders had upon the assets of the old company shall continue as a floating security upon the assets of the new company. That has not been done. Of course, it could not be done directly. It could only be done by in some way imposing upon the old company on the one hand the obligation to procure such a security from the reconstructed company and by imposing on the debenture-holders on the other hand the obligation to accept that fresh security from the reconstructed company. That, however, has not been done, and it seems to me, therefore, that you can only give to those words their natural and ordinary construction, namely, that the parties, without specifying all the events under which by law the floating security might become crystallized, have specified some of them only, and have not provided as a matter of bargaining that, notwithstanding the general law, the other events shall not crystallize the security. It seems to me, therefore, that so far as the debentures are concerned they fall within the principle of the two cases to which I have referred, notwithstanding that the winding up for the purpose of reconstruction is not one of the events specifically mentioned in the debentures.

With regard to the trust deed the case is rather stronger. By the terms of that deed the trustees are authorized as their primary trust to permit the company "to hold and enjoy all the mortgaged premises, and to carry on therein and therewith the business, or any of the businesses authorized by the memorandum of association of the company, and to call up and receive any of its capital until the security hereby constituted becomes enforceable as hereinafter provided." It is quite true that the security has not become enforceable according to the terms of that deed, and it may well be that it might be the duty of the trustees to permit the company to enjoy the premises and carry on business therewith; but that is not what they are doing. The trustee is permitting a different person, that is to say the new company which was incorporated last year, to hold and enjoy the premises and to carry on business therewith. That is not within the terms of the trust. Exactly the same objection occurs in giving the construction contended for by the defendants to clause 7 of the trust deed as occurs in giving that construction to the debentures. You cannot by giving the clause that construction render it a sensible arrangement, or one which as a matter of business the parties would be likely to enter into, without at the same time extending the provisions of the primary trust in the same way as I suggested it would be necessary to extend the provisions of the temporary licence contained in the debentures in order to make such a bargain as that which is contended for sensible. It is not enough merely to provide that the security shall not become enforceable.

In my judgment the terms upon which the postponement of payment was assented to by the debenture-holders included the continuance of this security as a floating security in the hands of the original company, and when the business of the original company came to an end by its winding up that condition ceased to be fulfilled, and thereupon the debentures became payable. I am of opinion, therefore, that the plaintiffs are entitled immediately to maintain the present action, and when the proper time comes to obtain judgment for the relief which they claim.

Under those circumstances they ask for the appointment of a receiver. The defendants on the other hand say, and say quite truly, that the new company is a prosperous company; that the arrangement proposed is one which is perfectly honest and one which the trustee and the majority of the debenture-holders believe to be for the benefit of the debenture-holders, and a transaction to which the majority of the debenture-holders have assented, and that I ought not at the instance of the plaintiffs, who represent a minority of the debenture-holders, to appoint a receiver, the appointment of whom might damage the company; or that I ought at all events not to make that appointment on an interlocutory application.

With regard to the last contention it appears to me there is really nothing in it. The case is one of a person who is entitled to an equitable charge upon property which is immediately realizable. The appointment of a receiver is made in view of the ultimate realization of the charge and for the purpose of protecting the property against inroads from outside. Why, because the case happens to be a somewhat important one, and the transaction on which the company has embarked is honest and straightforward and the new company is carrying on an active business, should the plaintiffs be deprived of the right which they have to assert in the only legal way they can and at the earliest moment the crystallization of their security and their right to have it enforced? I do not follow that argument. I think the right to the appointment of a receiver is one of the ordinary rights which accrue to a mortgagee, and especially to an equitable mortgagee who has no means of taking possession and whose security has become realizable as one of the steps in such realization. I think, therefore, the plaintiffs are entitled to have a receiver appointed, but inasmuch as the new company is, as I have already said, a prosperous company, and to put a stranger in possession of the assets immediately might do it some damage, I think I may quite properly, in accordance with the practice of the Court, while making an immediate appointment, direct that the receiver shall not give security or take possession of the assets until the expiration of a limited time.

It was ultimately agreed that the matter should be referred to chambers to appoint a proper person as receiver with liberty

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to apply for the appointment of a manager, but the order was not to be proceeded with for a period of six weeks except by the consent or order of the judge. His Lordship made an order in these terms. (1)

Solicitors: *Kennedy, Ponsonby, Ryde & Co.; Deacon, Gibson & Co.; Thorowgood, Tabor & Hardcastle.*

W. I. C.

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Feb. 27.

RICHMOND *v.* BRANSON & SON.

[1913 R. 1761.]

Practice—Striking out Pleadings—Action by Lunatic not so found—Lunacy not admitted by Defence—Relevant Issue at Trial—Authority of Solicitors of Plaintiff to bring Action—Striking out so much of Defence as did not admit Lunacy—Costs—Rules of the Supreme Court, 1883, *Order* XXV., *r.* 4.

In an action brought by a plaintiff described as "of unsound mind not so found" by her next friend against a firm of solicitors for delivery up of certain deeds and documents of title which had been deposited with them by the plaintiff as her solicitors, the statement of claim alleged that the plaintiff was and had for many years past been a person of unsound mind not so found. The defendants by their defence stated that they did not admit that, either at the time when the deeds and documents came into their possession or at any time since, the plaintiff was, or that she now was, a person of unsound mind; that they held the deeds and documents for her; and that she alleged that she was during the period in question, and still was, of full mental capacity and soundness of mind.

On an application by the plaintiff to strike out so much of the defence as did not admit the unsoundness of mind of the plaintiff and for judgment on the admissions in the defence :—

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(1) After this decision the old company took steps under s. 120 of the Companies (Consolidation) Act, 1908, to obtain a scheme embodying in effect the arrangements which had previously been made with the majority of the debenture-holders but increasing the interest on the debentures to 5½ per cent. A scheme was accordingly prepared and a petition presented to obtain the sanction of the Court to it. The petition was heard before Warrington J., at the request of Astbury J., on April 6, 1914, when the plaintiffs appeared to oppose. His Lordship sanctioned the scheme, and thereupon it was agreed between the parties that in consideration of the plaintiffs being paid their solicitor and client costs of their opposition to the petition and of the action all proceedings in the action should be stayed and that the appeal of which the defendants had given notice should be abandoned.

Held, that the defendants by raising the issue as to the unsoundness of mind of the plaintiff were in effect denying the authority of the plaintiff's solicitors to bring the action, and that that was not an issue which it was competent to them to raise at the trial.

Held, therefore, that so much of the defence as did not admit the unsoundness of mind of the plaintiff must be treated as irrelevant, and that the plaintiff was entitled to an order for delivery up of the deeds and documents on the admissions in the defence.

MOTION.

By an order in lunacy dated June 18, 1913, George Maurice Wright was appointed a receiver of the rents and profits and the income of the property of Miss Mary Morton Richmond, a person of unsound mind not so found by inquisition.

In November, 1913, application was made by the receiver purporting to act on behalf of Miss Richmond to Messrs. Branson & Son, a firm of solicitors, to deliver up to the receiver certain deeds and documents in their custody relating to her property, which had been deposited by her some twenty years ago with them as her solicitors. Messrs. Branson & Son refused to do so, and thereupon the present action was commenced against them in the name of Miss Richmond, who was described in the writ as a person of unsound mind not so found by inquisition, by George Maurice Wright, her next friend.

The statement of claim alleged (par. 1) that the plaintiff was and had for many years past been a person of unsound mind not so found by inquisition, and (par. 9) that unless the receiver was in possession of the deeds and documents of title he would not be in a position to and would be unable to perform the duties imposed on him by the order in lunacy, and it claimed (inter alia) (1.) a declaration that the plaintiff was entitled to have the deeds and documents of title delivered up to G. M. Wright on her behalf, and (2.) that the defendants might be ordered to deliver up the deeds and documents to G. M. Wright accordingly.

The defendants by their defence (par. 2) stated that they did not admit that either at the time when the deeds and documents came into their possession or on June 18, 1913, the date of the

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lunacy order, or at any time since, the plaintiff was, or that she now was, a person of unsound mind. They further alleged (par. 5) that they held, and had always during their custody thereof held, the said deeds and documents as solicitors for and on behalf of the plaintiff, who since (at the latest) January 24, 1913, had always contended and alleged, and still contended and alleged, that she was during such period and still was of full mental capacity and soundness of mind, and who had never requested the defendants to hand over to herself or to any other person any of the said deeds and documents. By par. 8 they stated that they had never refused or neglected, and did not now refuse or neglect, to hand over the said deeds and documents to any person lawfully demanding the same and entitled to receive and give a discharge therefor, but they asserted that neither under the order of June 18, 1913, nor otherwise had the receiver any authority so to do.

This was a motion on behalf of the plaintiff that so much of par. 2 of the defence as did not admit that the plaintiff was at the date of the order in lunacy appointing the receiver or at any time since or that she now was a person of unsound mind and so much of pars. 5 and 8 of the defence as was inconsistent with the plaintiff being of unsound mind at the dates mentioned might be struck out as frivolous and vexatious and as an abuse of the process of the Court, and for such judgment or order as consequent upon such parts of the said paragraphs of the defence being struck out and upon the admissions in the defence the Court might consider the plaintiff entitled to.

Clauson, K.C., and *J. W. Manning*, for the motion. The present motion is made under Order xxv., r. 4, and also under the inherent jurisdiction of the Court. The plaintiff is here suing by her next friend, and no question as to the unsoundness of mind of the plaintiff can be raised in the action. The issue raised by the defendants in their defence is frivolous and vexatious and an abuse of the process of the Court. The defendants would have had no difficulty in getting rid of the deeds in question by handing them over to the Master in Lunacy: Rules in Lunacy, 1892, rr. 44, 55, 56.

[*H. Terrell, K.C.*, referred to *In re Ind, Coope & Co.* (1)]

It is submitted that so much of the defence as relates to the unsoundness of mind of the plaintiff ought to be struck out.

H. Terrell, K.C., and *J. M. Gover*, for the defendants. It is a new thing to say that a person may recover possession of the deeds of another person by alleging that she is a lunatic and bringing an action in her name for their delivery up.

[WARRINGTON J. If the alleged lunatic wishes to raise the question of her unsoundness of mind there are ways of doing so.]

The defendants desire to obtain a proper discharge if they give up the deeds. There is no order empowering the receiver to receive and give a discharge for the deeds. The position of a receiver appointed in a lunacy is dealt with in *In re A Debtor.* (2) An order in lunacy appointing a receiver is simply an order to protect the property of the alleged lunatic. There is no finding in it of lunacy and the order is not conclusive, though it may be prima facie evidence of unsoundness of mind. In the order in the present case the plaintiff is described as "an alleged person of unsound mind." The case really raises a very important question of principle. The plaintiff is either of unsound mind or she is not. If she is, the Master has full power to make any order he likes as to dealing with her property: Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 333. If an order had been obtained by the receiver under that section the defendants would have obeyed it.

The defendants are, it is submitted, entitled to put in issue the question whether or not the plaintiff is of unsound mind. If they cannot do so, then it will be open to any person to come and sue in the name of another person alleging that such person is a lunatic, and the defendants will be unable to contest the allegation of lunacy even though in fact it may be untrue and part of a scheme to defraud the nominal plaintiff. Here the next friend has alleged unsoundness of mind in the heading to the statement of claim. If the plaintiff had brought the action in her own name simpliciter the question of her lunacy could not have been raised: the only question which could have been raised would have been whether she authorized the action.

(1) (1909) 26 Times L. R. 11.

(2) [1913] W. N. 63.

The issue here is whether the defendants were wrong in refusing to hand over the deeds at the time they did. At the trial they will be entitled to say that their refusal to hand over the deeds was not wrongful because the plaintiff was not of unsound mind and did not in fact require them to hand over the deeds. If the plaintiff really is a lunatic the only Court which can deal with her property is the Court in Lunacy. The power of the receiver is limited by the order. This action ought never to have been brought. The receiver ought to have gone to the Master in Lunacy and have obtained from him an order expressly authorizing him to receive the deeds. The defendants could not have safely handed over the deeds to the receiver without such an order. If they had done so and the plaintiff had subsequently proved that she was not a lunatic and had brought an action against them to recover the deeds they would have had no defence to the action.

[WARRINGTON J. Can you refer me to a single case in which the authority of the plaintiff to the action being brought has been disputed at the trial? The question of the authority is not a relevant issue at the trial.]

It is a most relevant and material issue in this case whether the nominal plaintiff is of unsound mind. There appears to be no reported case in which the non-admission of an allegation in the statement of defence has been held to be frivolous and vexatious. The point as to whether the plaintiff is of unsound mind is one which may be taken by the defendants. As between the plaintiff and the defendants the question of authority to bring the action is not the relevant issue. The issue here has always been not whether the deeds which were deposited with the defendants by the plaintiff some twenty years ago should be handed over to the plaintiff, but whether they should be handed over to the receiver. If the allegation in the statement of claim as to the unsoundness of mind of the plaintiff is not material it is difficult to see how the traverse of it in the defence can be frivolous and vexatious and an abuse of the process of the Court. In any event it is submitted that the case is not one in which the summary jurisdiction of the Court ought to be invoked.

Clauson, K.C., in reply.

[WARRINGTON J. I am not sure that the best way would be not to strike out the allegations in the defence, but to treat the defence as a sufficient admission.]

That is what is really asked for by the last part of the notice of motion.

WARRINGTON J. This is an application asking in form that certain parts of the defence may be struck out, and that, on those parts of the defence being struck out, the plaintiff may have such judgment as, upon the admissions contained in the defence, she is entitled to.

The application really raises an important question of practice or procedure, namely, whether it is competent to a defendant to insist on trying, as a relevant issue in the action itself and at the trial, the question whether or not the plaintiff's solicitors had sufficient authority to institute the action.

The facts of the case are these. The action is brought by Miss Mary Morton Richmond, described in the writ as a person of unsound mind not so found by inquisition, by George Maurice Wright, her next friend. It is brought against two solicitors who admittedly had in their possession certain title deeds and documents belonging to the plaintiff. The plaintiff, by her statement of claim, asks for a declaration that she is entitled to have those deeds delivered up to George Maurice Wright on her behalf, and for an order that the defendants deliver up the deeds to George Maurice Wright accordingly. The defendants, by their defence, set up an allegation, to which I will refer presently, and, but for which, they admit the claim of the plaintiff—that is to say, they admit that they have in their possession certain deeds and documents the property of the plaintiff, and they submit to deliver them up to her or to any person properly authorized on her behalf.

If there were nothing else, the plaintiff would, in my opinion, upon these admissions, plainly be entitled to judgment against the defendants for delivery up of those documents to the person she indicates as the person to receive them. The defendants, however, set up, or attempt to set up, as an issue in the action the question whether or not the plaintiff is in fact of unsound mind. In other words, they dispute the authority of the solicitors instructed by the next friend, and that of the next friend himself, to institute the action. Now is that an issue which it is competent to the defendants to raise at the trial? In my opinion it is not. The action, in whatever form it is brought, is the action of the plaintiff. If a solicitor is acting without authority in an action brought by a plaintiff who is not alleged to be of unsound mind, either the plaintiff or the defendant is entitled to have that action summarily stayed, and to an order that the solicitor should pay the costs of the action as between solicitor and client. There is really, in principle, no distinction between an action brought by a plaintiff of unsound mind, or alleged to be of unsound mind, by her next friend, and an action brought by an ordinary plaintiff. In both cases the real question, if there is any question at all, is that of the authority of the solicitor. Of course, in the case of a person suing by a next friend there is the further question of the authority of the next friend, and in those cases it is competent either to the plaintiff himself, that is to say the person who is assumed to be non compos mentis or not sui juris, or to the defendants to put a summary end to the proceedings, and, in the case of a next friend, he also would be subject to an order to pay the costs. But the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the Court, to justify that proposition. The business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shewn not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority.

In my opinion the defendants, by alleging in their defence what is tantamount to a lack of authority on the part of the solicitors who instituted the action, have raised an issue which it is not competent to them to raise as an answer to the claim, though it is competent to them to raise it in other proceedings. On that ground the action is, in my opinion, undefended, and the plaintiff is entitled to the relief which she asks, namely, that the deeds be delivered up to George Maurice Wright, the person whom she indicates in that behalf. It does not matter in the least that he happens to be the receiver of the income appointed by the Master in Lunacy. That is immaterial. If George Maurice Wright had been any other person the position would have been the same. The plaintiff, who is the owner of the property, asks for the delivery of that property to a certain person, and she is entitled to have the property so delivered.

Then comes the question of costs. Prior to action no effective demand for the delivery of the deeds was, of course, made, because the demand then was by Wright himself as receiver. If the writ, when issued, had asked in clear terms for the delivery up of the deeds to a particular person, that, of itself, would have been a sufficient demand for the delivery up of the deeds to that person, but, unfortunately, the writ did not ask for that relief. The writ asked, in the alternative, for a declaration that the plaintiff was entitled to have delivery up to her, or to George Maurice Wright on her behalf, of the deeds in question and to an order that the defendants should deliver them up accordingly. But when the statement of claim was delivered that did ask in definite and unambiguous terms for the delivery up of the deeds to George Maurice Wright. It seems to me that from the time when the statement of claim was delivered the defendants were in the wrong. I must therefore give to the plaintiff the relief to which, upon the pleadings, I think she is entitled, not, in form, striking out the allegations which are objected to, but treating them as irrelevant, as not raising any issue between the plaintiff and the defendants, and making the order on the admissions in the defence, namely, that the defendants have these documents in their possession and that they are willing to deliver them up to any person duly authorized. Then my order that they should deliver them up to George Maurice Wright will be sufficient authority to them, if they require anything more, but from the time that the statement of claim was delivered I think no further authority was

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necessary. I must therefore order them to deliver up the deeds and to pay the costs of the action as from the time when the statement of claim was delivered, but the plaintiff must pay the costs up to the time of the delivery of the statement of claim, with a set-off.

Solicitors: *Boyce & Evans; Taylor, Stanbury & Co.*

W. I. C.

C. A.
1914
April 30.

In re YOUNG.
YOUNG *v.* YOUNG.

[1912 Y. 680.]

Will—Construction—Advances by Parent to Children—Release by Will—Residue bequeathed to Widow for Life and then to Children—Direction to bring Advances by Way of Loan into Account on Division.

A testator had made advances by way of loan to each of his sons on the understanding that they were to carry interest, but that the testator would not enforce payment, and that if unpaid the advances were ultimately to be brought into account in the division of the testator's estate. The testator never required any repayment, but parts of the sums were repaid spontaneously. By his will the testator gave his residuary estate to his wife upon trust to receive the income and apply the same for her own use for life, and after her decease he gave the residue to trustees upon trust to divide the same among such of his children who should then be alive, the issue of any deceased child to take his or her parent's share. The will, as altered by two codicils, contained a proviso that if a son should at the death of the testator's wife be an undischarged bankrupt his share should be held in trust for his wife, and a direction that in making such division any advances made to any son during the testator's lifetime which had not been repaid should be brought into account by him with interest at 2 per cent. from the date of the advance to the date of the testator's wife's death:—

Held, that the sons were not released from the obligations which they were under as debtors to repay the advances made by the testator, and that the testator's widow was entitled during her life to the interest on the amount of the advances.

Decision of Sargant J., ante p. 581, affirmed.

APPEAL from a decision of Sargant J. (1)

The appellant was one of the testator's sons to whom advances had been made.

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(1) Ante p. 581.

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J. E. Harman, for the appellant.

Andrewes-Uthwatt, for another advanced son.

E. M. Winterbotham and *A. de W. Mulligan*, for the respondents.

The Court (Cozens-Hardy M.R., Swinfen Eady L.J., and Pickford L.J.) upon the construction of the will and codicils took the same view as that expressed by Sargant J. and dismissed the appeal.

Solicitors: *Syrett & Sons; Spencer, Gibson & Son; Shoubridge & Becher.*

G. A. S.

END OF VOL. I.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1914, will be as follows:—

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The fourth of the periods mentioned in the Thellusson Act during which accumulation is allowed, namely, "The minority or respective minorities only of any person or persons who under the . . . . trusts of the . . . . will . . . . directing such accumulations would for the time being, if of full age, be entitled unto the rents . . . . so directed to be accumulated," is not confined to the minority of persons born in the lifetime of the testator, but extends to the minorities of persons born after his death and also to successive minorities.

The dicta in *Haley* v. *Bannister* (1819) 4 Madd. 275, 277; *Ellis* v. *Maxwell* (1841) 3 Beav. 587, 597; *Bryan* v. *Collins* (1852) 16 Beav. 14; and *Jagger* v. *Jagger* (1883) 25 Ch. D. 729, 733, discussed and not followed.

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ADMINISTRATION —*Creditor's Action — Common Account — Liability under Covenants in Lease—Executors of Lessee's Deceased Executor—Devastavit—Distribution among Beneficiaries of Lessee's Residue more than Six Years before Action—Action to recover Money—Statute of Limitations—Trustee Act*, 1888 (51 *&* 52 *Vict.* *c.* 59), *s.* 1, *sub-s.* 3; *s.* 8, *sub-s.* 1 (*a*) *and* (*b*).

The lessee under certain leases from the plaintiffs died in January, 1902, having specifically bequeathed the leaseholds to his wife for life and after her death to his children. In October, 1902, his executors distributed the entire residue without making any provision against their liability under the covenants in the leases otherwise than by taking an indemnity from the beneficiaries. In 1906 one of the executors died. After 1909 the rent under the leases fell into arrear. In 1911 the plaintiffs commenced a creditor's administration action against the surviving executor and the beneficiaries, to which action the executors of the deceased executor were subsequently added as defendants, for the purpose of taking the estate accounts and charging the estate of the deceased executor with all sums received by him:—

Held by the Court of Appeal (Cozens-Hardy M.R. and Swinfen Eady L.J., Phillimore

ADMINISTRATION—*continued.*

L.J. dissenting), that, as against the executors of the deceased executor, the action, although in form a common creditor's administration action, was in reality an action the whole object of which was to recover money within the meaning of s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, and that under the provisions thereof the lapse of time afforded these defendants a good defence.

Decision of Warrington J. [1913] 1 Ch. 358 reversed.

How v. *Earl Winterton* [1896] 2 Ch. 626 applied.

Per Swinfen Eady L.J.: An executor can plead the Trustee Act, 1888, against a creditor in like manner as an express trustee can plead it against his cestui que trust.

The principle stated in *In re Marsden* (1884) 26 Ch. D. 783, and *In re Hyatt* (1888) 38 Ch. D. 609, that an executor cannot set up his own devastavit in order to obtain the benefit of the Statute of Limitations, has been altered by the Trustee Act, 1888.

Per Phillimore L.J. (dissenting): The lapse of time which under s. 8, sub-s. 1 (*b*), the executors of the deceased executor were entitled to plead in bar, being such only as they could have pleaded in an action for money had and received, ran from the time when the creditors could have first sued, and as the plaintiffs' right of action first accrued after 1909 when the rent fell into arrear, the plea of lapse of time did not afford these defendants a good defence. *In re* BLOW. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL *v.* CAMBDEN **C. A. 233**

2. —— *Executor—Insolvent Estate—Preferment of Creditors—Payment of Debts to Amount in Excess of Assets in Hand—Right of Executor to recoup himself out of Subsequent Assets.*

To entitle an executor to insist on his right to prefer a creditor and to be allowed the amount paid by him out of the assets of the testator's estate, it is not necessary for him, in the event of the estate proving insolvent, to establish that at the time he made the payment he had assets of the testator in hand. He may if he pleases himself advance the money to the estate for the purpose of such payment, and if he does so he will be entitled to recoup himself out of subsequent assets of the estate which may come into his hands.

Hepworth v. *Heslop* (1849) 6 Hare, 561, discussed. *In re* JONES. PEAK *v.* JONES **Warrington J. 742**

3. —— *Executors — Assets of Testator — No Power to carry on Business—Business carried on by Executors—Executors' Right to Indemnity—Rights of Creditors of Testator and Subsequent Creditors of Executors — Knowledge — Acquiescence—Priority.*

Testator, a boilermaker, who died in 1908, by his will appointed his widow and his son his executors and devised and bequeathed all his real and personal estate to his widow absolutely. The will contained no power to the executors to carry on the business. The widow and son continued to carry on the business as executors until the beginning of November, 1912. The widow received certain weekly sums and the son was paid an ordinary salary as manager. All the testator's creditors with the exception of three had been paid. In November, 1912, two of the three unpaid creditors obtained the ordinary creditors' decree for administration. Both the plaintiffs were aware that the business was being carried on, but took no steps to interfere with it. In December, 1913, an application was made by subsequent creditors for a declaration that the executors were entitled to an indemnity out of the assets for debts incurred in carrying on the business in priority to the original creditors of the testator, and that the applicants and all other new creditors might have the benefit of such indemnity. Joyce J. refused the application. On appeal:—

Held, that as the executors had carried on the business for the benefit of the widow and not under an agreement with the testator's creditors, the applicants were not entitled to an indemnity out of the testator's estate in priority to the persons to whom the testator was indebted at his death.

Held, also, that merely standing by with knowledge that the business was being carried on and abstaining from interference with it were not of themselves sufficient to constitute the original creditors of the testator persons entitled to the subsequent assets and therefore bound to give effect to the indemnity.

Dowse v. *Gorton* [1891] A. C. 190 distinguished.

Dicta of Kekewich J. in *In re Brooke* [1894] 2 Ch. 600, 607, and of the Master of the Rolls in Ireland in *In re Hodges* [1899] 1 I. R. 480, 484, disapproved of.

Decision of Joyce J. affirmed. *In re* OXLEY. JOHN HORNBY & SONS *v.* OXLEY – **C. A. 604**

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—— Will—Trust for conversion—Power to postpone—Hotchpot—Difficulty of realizing estate – – – – – **358**
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APPOINTMENT—Company—Appointment of unqualified persons—Irregularity in allotting shares—Meaning of "share capital"—Directors—Power of election by sole remaining director—Light railway company - - - - 568
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—— Company—Directors.
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ASSIGNMENT — Corporation — Successors and assigns — Undertaking — Dissolution—Reversion to grantors — Liability to perform statutory obligations - 300
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—— Goodwill—Assignor—Deed of assignment for benefit of creditors—Compulsory alienation—Sale of business and goodwill by trustee — Solicitation of old customers by assignor - - 562
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AUDITORS—Company—Duties—Legal knowledge — Balance-sheet — Ultra vires payments - - - - - 139
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BANK—Mortgage—Redemption—Transfer of stock as collateral security—Fraudulent pledge of stock by mortgagee to bank—Sub-mortgage of land to bank without notice of fraud—Mortgagor's right to redeem as against bank - 22
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BUILDING—Settled land—Authorized improvement — Necessary ancillary improvement—Conversion of land into building land—Estate office – – – **227**
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BURIAL—*Extension of Parish Churchyard—Interment within One Hundred Yards of a Dwelling-house—Burial Act*, 1855 (18 *&* 19 *Vict. c.* 128), *s.* 9—*Consecration of Churchyards Act*, 1867 (30 *&* 31 *Vict. c.* 133).

Sect. 9 of the Burial Act, 1855, which provides that "no ground not already used as or appropriated for a cemetery shall be used for burials under the" Burial Acts, 1852 to 1855, "within the distance of one hundred yards from any dwelling-house, without" the consent of the owner, lessee, and occupier thereof, does not, in the case of a consecrated extension (under the Consecration of Churchyards Act, 1867) of a churchyard, even where such consecrated extension is within an area in which an Order in Council has been made providing that no new burial ground is to be opened without the previous approval of the Local Government Board, give the owner of a dwelling-house within 100 yards a separate individual right to object to and prohibit the user of the ground for burials without his consent in writing.

Greenwood v. *Wadsworth* (1873) L. R. 16 Eq. 288 not followed.

Semble, that no such separate or individual right is given except in the case of land appropriated or used as a burial ground or as an additional burial ground under the Acts themselves. Clegg *v.* Metcalfe – **Sargant J. 808**

BUSINESS — Executors—Assets of testator—No power to carry on business — Business carried on by executors—Executors' right to indemnity—Rights of creditors – – – – **604**
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—— *Aaron's Reefs* v. *Twiss* – [1896] A. C. 273
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—— *Alabaster* v. *Harness* – [1895] 1 Q. B. 339
Followed. Oram *v.* Hutt **[1914] 1 Ch. 98**

—— *Andrews* v. *Paradise* – (1725) 8 Mod. 318
Explained. Pettey *v.* Parsons **[1914] 1 Ch. 704**

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—— *Ankerson* v. *Connelly* – [1907] 1 Ch. 678
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—— *Barber* v. *Penley* – – [1893] 2 Ch. 447
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—— *Barbuit's Case* – (1737) Cas. *t.* Tal. 281
Discussed and explained. *In re* Republic of Bolivia Exploration Syndicate, Limited **[1914] 1 Ch. 139**

—— *Barnes, Ex parte* – – [1896] A. C. 146
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—— *Barraclough* v. *Cooper* [1908] 2 Ch. 121, note.
Followed. *In re* Williams. Metcalf *v.* Williams – – **[1914] 1 Ch. 219**

—— *Bateman (Lady)* v. *Faber* [1898] 1 Ch. 144, 149.
Dictum of Lindley M.R. in, explained and distinguished. *In re* Wimperis. Wicken *v.* Wilson – **[1914] 1 Ch. 502**

—— *Bentley & Co.* v. *Black* (1893) 9 Times L. R. 580.
Distinguished. *In re* Pacaya Rubber and Produce Company. Burns' Application – – **[1914] 1 Ch. 542**

—— *Beverly, In re* – [1901] 1 Ch. 681, 688
Followed. *In re* Craven. Watson *v.* Craven – – – **[1914] 1 Ch. 358**

—— *Blair Open Hearth Furnace Co.* v. *Reigart* (1913) 108 L. T. 665.
Distinguished. Barron *v.* Potter. Potter *v.* Berry – **[1914] 1 Ch. 895**

—— *Blanchard* v. *Bridges* (1835) 4 Ad. & E. 176
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—— *Blow, In re; Governors of St. Bartholomew's Hospital* v. *Cambden* [1913] 1 Ch. 358.
Reversed – – **[1914] 1 Ch. 233**

—— *British Burmah Lead Co., In re* (1887) 56 L. T. 815.
Principles stated in, discussed and applied. *In re* Pacaya Rubber and Produce Company. Burns' Application – – – **[1914] 1 Ch. 542**

—— *Brooke, In re* – [1894] 2 Ch. 600, 607
Dicta of Kekewich J. in, disapproved of. *In re* Oxley. John Hornby & Sons *v.* Oxley – – **[1914] 1 Ch. 604**

—— *Brooks, In re* – (1897) 76 L. T. 771
Distinguished. *In re* Craven. Watson *v.* Craven – – **[1914] 1 Ch. 358**

—— *Brown, In re* – – (1890) 63 L. T. 159
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—— *Bryan v. Collins* – (1852) 16 Beav. 14
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—— *Burke* v. *Power* – – [1905] 1 I. R. 119 Considered. *In re* SMITH. JOHNSON *v.* BRIGHT-SMITH – **[1914] 1 Ch. 937**

—— *Carlisle Café Co.* v. *Muse Brothers & Co.* (1897) 67 L. J. (Ch.) 53 ; 77 L. T. 515. Followed. GOLDFOOT *v.* WELCH **[1914] 1 Ch. 213**

—— *Cattell, In re, Cattell* v. *Cattell. In re Cattell, Cattell* v. *Dodd* [1907] 1 Ch. 567. Affirmed – – – **[1914] 1 Ch. 177**

—— *Chaytor* v. *Trotter* – (1902) 87 L. T. 33 Applied. *In re* MORGAN. VACHELL *v.* MORGAN – – **[1914] 1 Ch. 910**

—— *Christopherson* v. *Naylor* (1816) 1 Mer. 320 Distinguished. *In re* WILLIAMS. METCALF *v.* WILLIAMS **[1914] 1 Ch. 219**

—— *Cocks* v. *Manners* – (1871) L. R. 12 Eq. 574 Followed. *In re* SMITH. JOHNSON *v.* BRIGHT-SMITH – **[1914] 1 Ch. 937**

—— *Cope, In re* – – – [1908] 2 Ch. 1 Distinguished. *In re* WILLIAMS. METCALF *v.* WILLIAMS **[1914] 1 Ch. 219**

—— *Corser* v. *Cartwright* (1873) L. R. 8 Ch. 971 Followed. *In re* MAJOR. TAYLOR *v.* MAJOR – – – **[1914] 1 Ch. 278**

—— *Coventry* v. *Higgins* – (1844) 14 Sim. 30 Questioned. *In re* PALFREEMAN. PUBLIC TRUSTEE *v.* PALFREEMAN **[1914] 1 Ch. 877**

—— *Cussen v. Hynes* – – [1906] 1 I. R. 539 Considered. *In re* SMITH. JOHNSON *v.* BRIGHT SMITH – **[1914] 1 Ch. 937**

—— *Davis* v. *Hutchings* – [1907] 1 Ch. 356, 365 Observations of Kekewich J. in, disapproved. *In re* ALLSOP. WHITTAKER *v.* BAMFORD – – **[1914] 1 Ch. 1**

—— *Dixon, In re* – – (1889) 42 Ch. D. 306 Followed. *In re* JEFFERY. NUSSEY *v.* JEFFERY – – **[1914] 1 Ch. 375**

—— *Doecham Gloves, Limited, In re* [1913] 1 Ch. 226. Overruled. *In re* SCHWEPPES, LIMITED **[1914] 1 Ch. 322**

—— *Dorin* v. *Dorin* – (1875) L. R. 7 H. L. 568 Referred to. *In re* PEARCE. ALLIANCE ASSURANCE COMPANY, LIMITED *v.* FRANCIS – – **[1914] 1 Ch. 254**

—— *Dowse* v. *Gorton* – – [1891] A. C. 190 Distinguished. *In re* OXLEY. JOHN HORNBY & SONS *v.* OXLEY **[1914] 1 Ch. 604**

—— *Du Bochet, In re* – – [1901] 2 Ch. 441 Overruled. *In re* PEARCE. ALLIANCE ASSURANCE COMPANY, LIMITED *v.* FRANCIS – – – **[1914] 1 Ch. 254**

—— *Eastwood* v. *Ashton* – – [1913] 2 Ch. 39 Reversed – – – **[1914] 1 Ch. 68**

—— *Ellis* v. *Maxwell* – (1841) 3 Beav. 587, 597 The dicta in, discussed and not followed. *In re* CATTELL. CATTELL *v.* CATTELL **[1914] 1 Ch. 177**

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—— *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218. Referred to. OMNIUM ELECTRIC PALACES, LIMITED *v.* BAINES **[1914] 1 Ch. 322**

—— *Escalera Silver Lead Mining Co., In re* (1908) 25 Times L. R. 87. Distinguished. *In re* HARRIS CALCULATING MACHINE COMPANY. SUMNER *v.* THE COMPANY – **[1914] 1 Ch. 920**

—— *Fisher* v. *Begrez* – (1833) 2 Cr. & M. 240 Discussed and explained. *In re* REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED **[1914] 1 Ch. 139**

—— *Fraser* v. *Murdoch* (1881) 6 App. Cas. 855 Distinguished. *In re* CRAVEN. WATSON *v.* CRAVEN **[1914] 1 Ch. 358**

—— *Frost, In re* – – (1889) 43 Ch. D. 246 Dictum of Kay J. in, followed. *In re* PARK'S SETTLEMENT. FORAN *v.* BRUCE – – – **[1914] 1 Ch. 595**

—— *Gardner* v. *Ingram* (1889) 61 L. T. 729 Indistinguishable. *In re* LANCASHIRE AND YORKSHIRE BANK'S LEASE. W. DAVIS & SON *v.* LANCASHIRE AND YORKSHIRE BANK – **[1914] 1 Ch. 522**

—— *Garritt* v. *Sharp* – (1835) 3 Ad. & E. 325 Distinguished. W. H. BAILEY & SON, LIMITED *v.* HOLBORN AND FRASCATI, LIMITED – – – **[1914] 1 Ch. 598**

—— *General Motor Cab Co, In re* [1913] 1 Ch. 377 Distinguished. *In re* SANDWELL PARK COLLIERY COMPANY **[1914] 1 Ch. 589**

—— *Gerard's (Lord) Settled Estate, In re* [1893] 3 Ch. 252. Distinguished. *In re* DE CRESPIGNY'S SETTLED ESTATES – **[1914] 1 Ch. 227**

—— *Gordon and Adams' Contract, In re. In re Pritchard's Settled Estate* [1913] 1 Ch. 561. Reversed – – – **[1914] 1 Ch. 110**

—— *Great Kruger Gold Mining Co., In re* [1892] 3 Ch. 307. Applied. *In re* PROPERTY INSURANCE COMPANY, LIMITED **[1914] 1 Ch. 775**

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—— *Greenwood* v. *Wadsworth* (1873) L. R. 16 Eq. 288. Not followed. CLEGG *v.* METCALFE **[1914] 1 Ch. 808**

—— *Haddock's Case* – – [1902] 2 Ch. 73 Applied. *In re* PROPERTY INSURANCE COMPANY, LIMITED **[1914] 1 Ch. 775**

—— *Haley* v. *Bannister* (1819) 4 Madd. 275, 277. The dicta in, discussed and not followed. *In re* CATTELL. CATTELL *v.* CATTELL **[1914] 1 Ch. 177**

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—— *Hargreaves, In re* – (1903) 88 L. T. 100
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—— *Hepworth* v. *Heslop* – (1849) 6 Hare, 561
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—— *Hill* v. *Crook*, (1873) L. R. 6 H. L. 265, 282, 283.
Referred to. *In re* PEARCE. ALLIANCE ASSURANCE COMPANY, LIMITED *v.* FRANCIS – – – **[1914] 1 Ch. 254**

—— *Hodges, In re* – [1899] 1 I. R. 480, 484
Dicta of the Master of the Rolls in Ireland in, disapproved of. *In re* OXLEY. JOHN HORNBY & SONS *v.* OXLEY – – – – **[1914] 1 Ch. 604**

—— *Hodson* v. *Tea Co.* – (1880) 14 Ch. D. 859
Followed and applied. *In re* CROMPTON & CO. PLAYER *v.* CROMPTON & CO.
[1914] 1 Ch. 954

—— *Hope Brothers, Ld.* v. *Cowan* [1913] 2 Ch. 312.
Dictum of Joyce J. in, followed. GOLDFOOT *v.* WELCH – **[1914] 1 Ch. 213**

—— *Hopkins* v. *De Robeck* – (1789) 3 T. R. 79
Discussed and explained. *In re* REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED **[1914] 1 Ch. 139**

—— *Horsnaill, In re* – – [1909] 1 Ch. 631
Approved. *In re* KIPPING. KIPPING *v.* KIPPING – – – **[1914] 1 Ch. 62**

—— *How* v. *Winterton (Earl)* [1896] 2 Ch. 626
Applied. *In re* BLOW. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL *v.* CAMBDEN – – – **[1914] 1 Ch. 233**

—— *Hyatt, In re* – – (1888) 38 Ch. D. 609
The principle stated in, that an executor cannot set up his own devastavit in order to obtain the benefit of the Statute of Limitations, has been altered by the Trustee Act, 1888. *In re* BLOW. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL *v.* CAMBDEN
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—— *Isle of Wight Ry. Co.* v. *Tahourdin* (1883) 25 Ch. D. 320, 332, 335.
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—— *Ive* v. *King* – – – (1852) 16 Beav. 46
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—— *Jagger* v. *Jagger* (1883) 25 Ch. D. 729, 733
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—— *James* v. *Hayward* – (1639) W. Jo. 221
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—— "*Jassy*," *The* – – – [1906] P. 270
Discussed and explained. *In re* REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED **[1914] 1 Ch. 39**

—— *John Tweddle & Co., In re* [1910] 2 K. B. 697.
Applied. *In re* PROPERTY INSURANCE COMPANY, LIMITED – **[1914] 1 Ch. 775**

—— *Jupp, In re* – – (1888) 39 Ch. D. 148
Discussed. *In re* JEFFERY. NUSSEY *v.* JEFFERY – **[1914] 1 Ch. 375**

—— *Karberg's Case* – – [1892] 3 Ch. 1
Principles stated in, discussed and applied. *In re* PACAYA RUBBER AND PRODUCE COMPANY. BURNS' APPLICATION – – **[1914] 1 Ch. 542**

—— *Kehoe* v. *Wilson* – (1880) 7 L. R. Ir. 10
Considered. *In re* SMITH. JOHNSON *v.* BRIGHT-SMITH – **[1914] 1 Ch. 937**

—— *Kingston Cotton Mill Co. (No. 2), In re* [1896] 2 Ch. 279 (as to company auditors).
Principles stated in, discussed and applied. *In re* REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED
[1914] 1 Ch. 139

—— *Lambert, In re* – – [1908] 2 Ch. 117
Followed. *In re* WILLIAMS. METCALF *v.* WILLIAMS – **[1914] 1 Ch. 219**

—— *Laybourn* v. *Gridley* (1892) 61 L. J. (Ch.) 352 is not inconsistent with *Williams* v. *Pott* (1871) L. R. 12 Eq. 149. MITCHELL *v.* MOSLEY
[1914] 1 Ch. 438

—— *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887) 36 Ch. D. 787.
Principles stated in, discussed and applied. *In re* REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED
[1914] 1 Ch. 139

—— *Liston* v. *Keegan* – (1882) 9 L. R. Ir. 531
Considered. *In re* SMITH. JOHNSON *v.* BRIGHT-SMITH – **[1914] 1 Ch. 937**

—— *Llewellyn, In re* – – [1911] 1 Ch. 451
Followed. *In re* BEAUCHAMP'S WILL TRUSTS. CADGE *v.* BARKER-HAHLO
[1914] 1 Ch. 676

—— *London and General Bank (No. 2), In re* [1895] 2 Ch. 673.
Principles stated in, discussed and applied. *In re* REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED
[1914] 1 Ch. 139

—— *Loring* v. *Thomas* – (1861) 1 Dr. & Sm. 497
Followed. *In re* WILLIAMS. METCALF *v.* WILLIAMS – **[1914] 1 Ch. 219**

—— *Lynde* v. *Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch. 178.
Principles stated in, discussed and applied. *In re* PACAYA RUBBER AND PRODUCE COMPANY. BURNS' APPLICATION – – **[1914] 1 Ch. 542**

—— *Lyons Corporation* v. *Advocate-General of Bengal* (1876) 1 App. Cas. 91, 115.
Applied. *In re* CUNNINGHAM. DULCKEN *v.* CUNNINGHAM
[1914] 1 Ch. 427

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—— *MacLaughlin* v. *Campbell* [1906] 1 I. R. 588.
Considered. *In re* Smith. Johnson *v.* Bright-Smith – [1914] **1 Ch. 937**

—— *Magdalena Steam Navigation Co.* v. *Martin* (1859) 2 E. & E. 94.
Discussed and explained. *In re* Republic of Bolivia Exploration Syndicate, Limited [1914] **1 Ch. 139**

—— *Mair* v. *Rio Grande Rubber Estates* [1913] A. C. 853.
Principles stated in, discussed and applied. *In re* Pacaya Rubber and Produce Company. Burns' Application – – [1914] **1 Ch. 542**

—— *Mann, In re* – – [1903] 1 Ch. 232
Applied. *In re* Cunningham. Dulcken *v.* Cunningham [1914] **1 Ch. 427**

—— *Marsden, In re* – (1884) 26 Ch. D. 783
The principle stated in, that an executor cannot set up his own devastavit in order to obtain the benefit of the Statute of Limitations, has been altered by the Trustee Act, 1888. *In re* Blow. Governors of St. Bartholomew's Hospital *v.* Cambden [1914] **1 Ch. 233**

—— *Martyn, In re* – (1900) 69 L. J. (Ch.) 733
Observed upon. *In re* Beauchamp's Will Trusts. Cadge *v.* Barker-Hahlo– – – – [1914] **1 Ch. 676**

—— *Mason* v. *Provident Clothing and Supply Co.* [1913] A. C. 724, at p. 745.
Observations of Lord Moulton on the severability of covenants in restraint of trade in, considered. S. V. Nevanas & Co. *v.* Walker and Foreman [1914] **1 Ch. 413**

—— *Metcalfe, In re*– – – [1909] 1 Ch. 424
Followed. *In re* Williams. Metcalf *v.* Williams – – [1914] **1 Ch. 219**

—— *Midland Express, Limited, In re: Pearson v. The Company* [1913] 1 Ch. 499.
Affirmed– – – – [1914] **1 Ch. 41**

—— *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149.
Discussed and explained. *In re* Republic of Bolivia Exploration Syndicate, Limited [1914] **1 Ch. 139**

—— *Morrow* v. *M'Conville* (1883) 11 L. R. Ir. 236.
Considered. *In re* Smith. Johnson *v.* Bright-Smith – [1914] **1 Ch. 937**

—— *Mudge, In re* – – – [1913] 2 Ch. 92
Reversed– – – [1914] **1 Ch. 115**

—— *Murphy* v. *Cheevers* (1885) 17 L. R. Ir. 205
Considered. *In re* Smith. Johnson *v.* Bright-Smith – [1914] **1 Ch. 937**

—— *Musther, In re* – – (1890) 43 Ch. D. 569
Distinguished. *In re* Williams. Metcalf *v.* Williams – [1914] **1 Ch. 219**

—— *Musurus Bey* v. *Gadban* [1894] 1 Q. B. 533; 2 Q. B. 352.
Discussed and explained. *In re* Republic of Bolivia Exploration Syndicate, Limited [1914] **1 Ch. 139**

—— *Nash, In re* – – [1910] 1 Ch. 1, 9, 10
Followed. *In re* Park's Settlement. Foran *v.* Bruce – [1914] **1 Ch. 595**

—— *New Zealand Loan and Mercantile Agency Co., In re* (1894) 10 Times L. R. 371, 379.
Distinguished. *In re* Property Insurance Company, Limited [1914] **1 Ch. 775**

—— *Noyes, In re* (June 23, 1891) [1914] 1 Ch. 618, reported as a note at p. 629.
Form of order of Lindley L.J. in, followed. *In re* E. D. S., a Person of Unsound Mind so found by Inquisition – – – [1914] **1 Ch. 618**

—— *Noyes* v. *Pollock* – – (1886) 32 Ch. D. 53
Referred to. *In re* Noyes [1914] **1 Ch. 629, n.**

—— *Oram* v. *Hutt* – – [1913] 1 Ch. 259
Affirmed – – [1914] **1 Ch. 98**

—— *Palace Hotel, In re* – [1912] 2 Ch. 438
Approved. *In re* Schweppes, Limited [1914] **1 Ch. 322**

—— *Palmer* v. *Graves* – (1837) 1 Keen, 545
Followed. *In re* Major. Taylor *v.* Major – – – [1914] **1 Ch. 278**

—— *Parsons, In re* – – (1890) 45 Ch. D. 51
Referred to. *In re* Mudge [1914] **1 Ch. 115**

—— *Pearce, In re; Alliance Assurance Co., Ld.* v. *Francis* [1913] 2 Ch. 674.
Affirmed – – [1914] **1 Ch. 254**

—— *Peter* v. *Stirling* – (1878) 10 Ch. D. 279
Distinguished. *In re* Scott. Scott *v.* Scott – – – [1914] **1 Ch. 847**

—— *Pickwick* v. *Gibbes* – (1839) 1 Beav. 271
Questioned. *In re* Palfreeman. Public Trustee *v.* Palfreeman [1914] **1 Ch. 877**

—— *Poyser, In re* – – [1908] 1 Ch. 828
Followed. *In re* Craven. Watson *v.* Craven – – [1914] **1 Ch. 358**

—— *Rawsthorne* v. *Rowley* [1909] 1 Ch. 409, n.
Distinguished. *In re* Brookes. Brookes *v.* Taylor – [1914] **1 Ch. 558**

—— *Reese River Silver Mining Co., In re* (1867) L. R. 2 Ch. 604.
Principles stated in, discussed and applied. *In re* Pacaya Rubber and Produce Company. Burns' Application – – – [1914] **1 Ch. 542**

—— *Richards, In re* – – [1902] 1 Ch. 76
Followed. *In re* Ryder. Burton *v.* Kearsley – – [1914] **1 Ch. 865**

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—— *Samuel Allen & Sons, Ld., In re* [1907] 1 Ch. 575, 582.
Rule laid down by Parker J. in, approved and adopted. *In re* Morrison, Jones & Taylor, Limited. Cookes *v.* Morrison, Jones & Taylor, Limited **[1914] 1 Ch. 50**

—— *Sims* v. *Quinlan* (1865) 17 Ir. Ch. Rep. 43
Considered. *In re* Smith. Johnson *v.* Bright-Smith – **[1914] 1 Ch. 937**

—— *Slevin, In re* – – [1891] 2 Ch. 236
Applied. *In re* Cunningham. Dulcken *v.* Cunningham **[1914] 1 Ch. 427**

—— *Smith* v. *Webster* – (1876) 3 Ch. D. 49
Distinguished. Daniels *v.* Trefusis **[1914] 1 Ch. 788**

—— *Soley, In re* – (1900) 17 Times L. R. 118
Applied. *In re* Cunningham. Dulcken *v.* Cunningham **[1914] 1 Ch. 427**

—— *Spackman* v. *Evans* (1868) L. R. 3 H. L. 171
Principles stated in, discussed and applied. *In re* Republic of Bolivia Exploration Syndicate, Limited **[1914] 1 Ch. 139**

—— *Staight* v. *Burn* – (1869) L. R. 5 Ch. 163
Followed and applied. W. H. Bailey & Son, Limited *v.* Holborn and Frascati, Limited – **[1914] 1 Ch. 598**

—— *Stock* v. *Meakin* – – [1900] 1 Ch. 683
Distinguished. *In re* Farrer and Gilbert's Contract **[1914] 1 Ch. 125**

—— *Studd* v. *Cook* – (1883) 8 App. Cas. 577
Distinguished. *In re* Sir William Miller. *In re* Sir James Miller. Bailie *v.* Miller – **[1914] 1 Ch. 511**

—— *Taylor* v. *Best* – – (1854) 14 C. B. 487
Discussed and explained. *In re* Republic of Bolivia Exploration Syndicate, Limited **[1914] 1 Ch. 139**

—— *Thomas* v. *Britnell* – (1751) 2 Ves. Sen. 313
Followed. *In re* Major. Taylor *v.* Major – – **[1914] 1 Ch. 278**

—— *Thomas* v. *Devonport Corporation* [1900] 1 Q. B. 16 (as to public auditors).
Principles stated in, discussed and applied. *In re* Republic of Bolivia Exploration Syndicate, Limited **[1914] 1 Ch. 139**

—— *Thomson's Estate, In re* (1880) 14 Ch. D. 263, 264.
Considered. *In re* Ryder. Burton *v.* Kearsley – **[1914] 1 Ch. 865**

—— *Thorn* v. *City Rice Mills* (1889) 40 Ch. D. 357.
Distinguished. *In re* Harris Calculating Machine Company. Sumner *v.* The Company – **[1914] 1 Ch. 920**

—— *Trego* v. *Hunt* – – [1896] A. C. 7
Discussed. Green & Sons (Northampton), Limited *v.* Morris **[1914] 1 Ch. 562**

—— *Triquet* v. *Bath* – (1764) 3 Burr. 1478
Discussed and explained. *In re* Republic of Bolivia Exploration Syndicate, Limited **[1914] 1 Ch. 139**

—— *Walbran, In re* – – [1906] 1 Ch. 64
Followed on one point and distinguished on another point. *In re* Harper. Plowman *v.* Harper **[1914] 1 Ch. 70**

—— *Walker v. Mottram* – (1881) 19 Ch. D. 355
Discussed. Green & Sons (Northampton), Limited *v.* Morris **[1914] 1 Ch. 562**

—— *Wallace* v. *Universal Automatic Machines Co.* [1894] 2 Ch. 547.
Followed and applied. *In re* Crompton & Co. Player *v.* Crompton & Co. **[1914] 1 Ch. 954**

—— *Walsh* v. *Walsh* – (1869) I. R. 4 Eq. 396
Considered. *In re* Smith. Johnson *v.* Bright-Smith – **[1914] 1 Ch. 937**

—— *Ward* v. *Byrne* – (1839) 5 M. & W. 548
Followed. S. V. Nevanas & Co. *v.* Walker and Foreman **[1914] 1 Ch. 413**

—— *Whitting* v. *Whitting* (1908) 53 Sol. J. 100
Followed. *In re* Park's Settlement. Foran *v.* Bruce – **[1914] 1 Ch. 595**

—— *Williams* v. *Pott* – (1871) L. R. 12 Eq. 149
Laybourn v. *Gridley* (1892) 61 L. J. (Ch.) 352 is not inconsistent with. Mitchell *v.* Mosley – – **[1914] 1 Ch. 438**

—— *Wrexham, Mold and Connah's Quay Ry. Co., In re* [1899] 1 Ch. 440.
Applied. *In re* Harris Calculating Machine Company. Sumner *v.* The Company – – **[1914] 1 Ch. 920**

—— *Young, In re; Young* v. *Young* [1914] 1 Ch. 581.
Affirmed – – **[1914] 1 Ch. 976**

CHARGE—Will—General charge of debts (including mortgage debts)—Specific devises—Exoneration – – **278**
See Will. 7.

CHARITABLE TRUST—"Residence for ladies of limited means"—Trustees to expend residue "as they know to be most in agreement with my desires"—Parol evidence – – – – – **662**
See Will. 4.

CHARITY—*Bequests to Charitable Society—Construction—Absolute Bequest of Leasehold Home—Annuity to maintain particular Home—Bequest of Life Annuities—Gift over to Residuary Charities after Final Expiration of aforesaid Trusts—Voluntary Sale of Home by Society—Maintenance Annuity applicable cy près.*

At the time of her will and her death, a testatrix, who held her house under a 999 years' lease, was carrying it on as a home in connection with a charitable society.

By her will dated March 13, 1902, she bequeathed the house to the treasurer and two other members of the society to be used as a home.

She also directed her executors and trustees

CHARITY—*continued.*

to hold the proceeds of sale of her residuary estate in trust to pay certain life annuities and to pay the treasurer of the society 120*l.* a year "for the maintenance and expenses of maintaining" the home, and "after the final expiration of the aforesaid trusts" the trustees were to hold the residuary trust funds in trust for certain residuary charities.

On the construction of the will it was clear that these annuities were charged on corpus.

The testatrix died on November 6, 1910, and the society carried on the home for another eighteen months. It was then voluntarily discontinued and sold by the society under the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 5, the society having formally decided not to apply for a retaining order under s. 8. The proceeds of sale were applied under a cy près scheme:—

Held, on the construction of the will, that the 120*l.* annuity continued during the 999 years of the lease. It was neither limited to the duration of the home, nor carried into residue for the benefit of the residuary charities on the cesser of the home, but, on the failure of the particular purpose after the testatrix's death, the general charitable intention in favour of the society prevailed, and the annuity was applicable cy près.

Lyons Corporation v. *Advocate-General of Bengal* (1876) 1 App. Cas. 91, 115; *In re Slevin* [1891] 2 Ch. 236; *In re Soley* (1900) 17 T. L. R. 118; and *In re Mann* [1903] 1 Ch. 232, applied. *In re* CUNNINGHAM. DULCKEN *v.* CUNNINGHAM - - - **Astbury J. 427**

2. —— *Custodian Trustee—Public Trustee Act*, 1906 (6 *Edw.* 7, *c.* 55), *ss.* 2, 4—*Public Trustee Rules*, 1912, *r.* 30.

Under the Public Trustee Act, 1906, s. 4, sub-s. 3, a corporate body empowered to undertake trusts within r. 30 of the Public Trustee Rules, 1912, can be appointed and has power to act as custodian trustee of real, leasehold, or personal estate devised or bequeathed upon charitable trusts. The prohibition against the Public Trustee himself accepting such a trust imposed by s. 2, sub-s. 5, of the same Act is personal to the Public Trustee; and there is nothing in the appointment of such a corporate body as custodian trustee which abridges or affects the powers or duties of the Official Trustee of Charity Lands or the Official Trustees of Charitable Funds within the meaning of s. 2, sub-s. 5.

The persons having power to appoint new trustees by statute or otherwise, in case a vacancy arises, can properly appoint a custodian trustee under s. 4 of the Public Trustee Act, 1906. *In re* CHERRY'S TRUSTS. ROBINSON *v.* TRUSTEES FOR WESLEYAN METHODIST CHAPEL PURPOSES - - **Sargant J. 83**

CHESTERFIELD GAS AND WATER BOARD ACT, 1895, s. 4 - - - - **270**
See GAS.

"**CHILDREN**"—Gift to—Illegitimate children—Belief of testatrix in their legitimacy—Exclusion—Will—Construction **254**
See WILL. 5.

CHURCHYARD—Burial.
See under BURIAL.

COLLATERAL SECURITY—Transfer of stock as—Fraudulent pledge of stock by mortgagee to bank—Mortgagor's right to redeem as against bank - - **22**
See MORTGAGE.

COMMITTEE—Lunatic.
See under LUNACY.

COMPANIES (WINDING-UP) RULES, 1909, r. 5, sub-r. 2 - - - - **775**
See COMPANY. 16.

COMPANY—*Arrangement—Scheme of Arrangement—Increase of Capital—Reorganization of Share Capital—Alteration of Preferential Rights—Modification of Memorandum—Consolidation of Classes of Shares—Division of Shares—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 45, 120.

The memorandum of a company provided that its capital should consist of 950,000*l.*, divided into 300,000 preferred shares, 300,000 ordinary shares, and 350,000 deferred shares (all of 1*l.* each) with such respective rights as were defined by the articles. The articles gave a cumulative preferential dividend of 7 per cent. to each of the three classes of shareholders in succession and divided the surplus profits between the ordinary and deferred shareholders. The company proposed a scheme of arrangement between the company and its ordinary shareholders, under s. 120 of the Companies (Consolidation) Act, 1908, whereby the company should be authorized to issue 100,000 new ordinary 1*l.* shares to rank equally with the existing ordinary shares, and that, as a consideration, a proportion of the new shares should be issued to the existing ordinary shareholders at par. A meeting of the ordinary shareholders was held under an order of the Court, made on the company's application under s. 120, and a resolution approving the scheme was passed by a majority sufficient to satisfy s. 120 but not sufficient to satisfy s. 45 of the Act. This petition was presented by the company for the confirmation of the scheme:—

Held (reversing the decision of Astbury J.), that the proposed arrangement did not modify the conditions contained in the memorandum and would not be an interference with any preferential rights; that it was therefore not within s. 45, and might be sanctioned under s. 120.

In re Doecham Gloves, Limited [1913] 1 Ch. 226, overruled.

In re Palace Hotel, Limited [1912] 2 Ch. 438, approved.

Per Curiam: Sect. 45 is confined to two modes of reorganizing the share capital, namely, by the consolidation of shares of different classes, and by the division of shares into shares of different classes. *In re* SCHWEPPES, LIMITED - - - **C. A. 322**

2. —— *Arrangement—Scheme of Arrangement—Reconstruction—Sale for Shares in New Company—Special Provision for Dissentient Members*

COMPANY—*continued.*

—*Jurisdiction under Arrangement Section—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120.

If proper provision is made for dissentient members, a reconstruction of an existing company by winding up and sale of the entire assets for shares in a new company may be effected under s. 120 of the Companies (Consolidation) Act, 1908.

In re General Motor Cab Co. [1913] 1 Ch. 377 distinguished. *In re* SANDWELL PARK COLLIERY COMPANY, LIMITED **Astbury J. 589**

3. —— *Debenture—Conditions—Place fixed for Payment of Principal—Default in Payment of Interest—Demand at Place—Limit of Borrowing Power—Excess—Pleading—Rules of the Supreme Court, Order* XIX., *r.* 14.

A company having borrowing powers limited to 3000*l.* procured an overdraft from their bankers on the guarantee, up to 3000*l.*, of the plaintiff and two others. When the overdraft was very nearly 3000*l.*, each guarantor at the request of the company gave the company his cheque for 1000*l.*, and the company afterwards paid off the overdraft with these cheques. The company issued to each guarantor a debenture for 1000*l.* and interest with conditions which made the principal payable, inter alia, if the holder should serve a notice on the company requiring payment of principal and interest and the company should make default for three days in payment of any part thereof, and that the principal should be paid at Lloyds Bank, 222, Strand. The plaintiff and another debenture-holder gave the company notice to pay off the principal and interest; the company made default for three days, and thereupon the plaintiff brought this action to enforce the debentures, asking the usual relief. The principal defence pleaded was that the limit had been exceeded. No demand for payment had been made at Lloyds Bank. This objection was not pleaded, but was raised at the hearing:—

Held, (1.) that the condition for payment at Lloyds Bank applied only to principal, and as the company had made default in payment of interest for three days after the plaintiff's demand, the principal had become due.

Thorn v. *City Rice Mills* (1889) 40 Ch. D. 357 and *In re Escalera Silver Lead Mining Co.* (1908) 25 T. L. R. 87 distinguished.

(2.) That the money was advanced by the plaintiff and the others for the purpose of, and was applied in, paying off the overdraft at the bank, and therefore the limit on the directors' borrowing powers had not been in substance exceeded.

In re Wrexham, Mold and Connah's Quay Ry. Co. [1899] 1 Ch. 440 applied.

Semble, the first objection ought to have been pleaded as "any condition precedent, the performance . . . . of which is intended to be contested" under Order XIX., r. 14. *In re* HARRIS CALCULATING MACHINE COMPANY. SUMNER *v.* THE COMPANY - **Astbury J. 920**

COMPANY—*continued.*

4. —— *Debentures—Floating Charge—Pari passu—Interest paid to some Holders down to a later Date than to others—Distribution of Assets in Debenture-holder's Action—Claim by other Holders to be paid Difference in Interest in full.*

Where debentures are charged by way of floating security to rank pari passu as a first charge on the property of the company "without any preference or priority over one another," and when the security comes to be enforced in a debenture-holder's action it appears that some debenture-holders have been paid interest by the company while a going concern down to a later date than other debenture-holders, the latter (in the absence of some express provision to that effect) are not entitled to have the assets applied in equalizing the amount of interest before any further distribution is made, but the amount found due to each debenture-holder for principal and interest ought to be calculated down to the date of the Master's certificate, and the assets distributed rateably according to the amounts so found due.

Decision of Sargant J. [1913] 1 Ch. 499 affirmed. *In re* MIDLAND EXPRESS, LIMITED. PEARSON *v.* THE COMPANY - - **C. A. 41**

5. —— *Debentures — Floating Charge — Reservation of Power to Company to "mortgage" or deal with its Property—Subsequent Floating Charge—Priority.*

A company in 1894 created a series of debentures headed "Issue of Debentures for 2000*l.*" By clause 5 of each debenture the company charged, with payment of 100*l.* and interest, "its undertaking and all its property both present and future (subject to any mortgages now affecting or which may hereafter affect the same or any part thereof)."

Clause 6 stated that the debenture was one of a series of twenty debentures for 100*l.* each, and that "all such debentures shall rank pari passu without regard to the date of issue thereof"; and clause 7 provided that "notwithstanding the charge hereby created, the company may, in the course of its business and for the purpose of carrying on the same, deal with its property as it may think fit, and in particular may mortgage and sell the same or any part thereof."

In 1904 the company created a second series of debentures, each in the same form as those of the first series, except that each debenture was headed "Second Issue of Debentures for 2000*l.*," and that clause 6 stated that the debenture was one of "a second series of twenty debentures for 100*l.* each," and that "all of such debentures, of this and the first series, shall rank pari passu without regard to the date thereof":—

Held, that the second debentures did not rank pari passu with the first debentures, but after them. *In re* BENJAMIN COPE & SONS, LIMITED. MARSHALL *v.* BENJAMIN COPE & SONS, LIMITED - - - **Sargant J. 800**

6. —— *Debenture—Floating Security—Covenant for Payment on Specified Day—Winding up*

COMPANY—*continued.*

of Company before such Day—Debenture-holders' Action—Appointment of Receiver.

In 1895 a company issued a series of debentures of 100*l.* each to secure the aggregate principal sum of 100,000*l.* The debentures, which were all in the same form, provided that the company would on January 1, 1920, or on such earlier day as the principal moneys thereby secured should become payable in accordance with the conditions indorsed thereon, pay to the registered holder the sum of 100*l.* with interest thereon as therein mentioned. The conditions provided that the principal moneys thereby secured should become immediately payable (inter alia) if an order was made or an effective resolution was passed for winding up the company otherwise than for the purposes of reorganization, reconstruction, or amalgamation. The debentures were secured by a trust deed which contained a similar provision. The combined effect of the debentures and the trust deed was to give a floating charge on all the assets. In June, 1913, the company passed a resolution for winding up for the purposes of reconstruction, and subsequently the assets of the company were transferred to a new company which had been incorporated for the purpose of taking them over. Two debenture-holders brought an action on behalf of themselves and all other holders of debentures in the old company to have the trusts of the trust deed carried into execution under the order of the Court. On an application by the plaintiffs for the appointment of a receiver:—

Held, that when the business of the transferor company came to an end by the winding up the security ceased to be a floating security of that company; that the debentures then became payable and the security became enforceable; and that the plaintiffs were entitled to the appointment of a receiver notwithstanding the provisions in the debentures and trust deed with reference to winding up for the purposes of reconstruction.

Hodson v. *Tea Co.* (1880) 14 Ch. D. 859 and *Wallace* v. *Universal Automatic Machines Co.* [1894] 2 Ch. 547 followed and applied. *In re* CROMPTON & CO., LIMITED. PLAYER *v.* CROMPTON & CO., LIMITED **Warrington J. 954**

7. —— *Debentures—Trust Deed—Remuneration of Trustees—Appointment of Receiver—Extent of Right to Remuneration.*

A trust deed to secure the first mortgage debenture stock of a company contained a clause under which the trustees of the deed were to hold the moneys to arise under the primary trust for conversion upon trust to pay the costs and expenses in the execution of the trust, including their own remuneration. A further clause provided that the company should in every year, "during the continuance of this security," pay to the trustees for the time being of the deed, "as and by way of remuneration for their services as trustees the sum of 105*l.*"

In 1911 an action was commenced by the debenture stock holders of the company to carry the trusts of the indenture into execution, and a receiver was appointed on July 14, 1911.

The hereditaments and premises comprised in the trust deed were sold pursuant to orders of the Court and the proceeds paid into Court. The sole trustee of the deed, who had received his remuneration down to January 1, 1911, claimed to be paid his remuneration down to the close of the proceedings in the action, out of the proceeds of sale, in priority to the debenture-holders, and to have a lien declared:—

Held, that the trustee was entitled to his remuneration down to the date of the appointment of the receiver out of the proceeds of sale, but inasmuch as he had not rendered any appreciable services since that date he was not entitled to any further remuneration. *In re* LOCKE & SMITH, LIMITED. WIGAN *v.* THE COMPANY - - - - **Eve J. 687**

8. —— *Directors — Additional Directors — Appointment by Board of Directors—Informal Meeting—Unable or unwilling to act—Power of Company in General Meeting — Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *Table A, cl.* 85.

A board meeting of directors can be held under informal circumstances, but the casual meeting of two directors even at the office of the company cannot be treated as a board meeting at the option of one against the will and intention of the other, and it makes no difference that a notice convening a board meeting has been sent by the one to the other if such notice has not in fact been received by the other.

Smith v. *Paringa Mines* [1906] 2 Ch. 193, distinguished.

Where the articles of association of a company incorporated under the Companies (Consolidation) Act, 1908, give to the board of directors the power of appointing an additional director, and owing to differences between the directors no board meeting can be held for the purpose, the company retains power to appoint additional directors in general meeting.

Observations of Cotton and Fry L.JJ. in *Isle of Wight Ry. Co.* v. *Tahourdin* (1883) 25 Ch. D. 320, 332, 335, followed.

Blair Open Hearth Furnace Co. v. *Reigart* (1913) 108 L. T. 665 distinguished. BARRON *v.* POTTER. POTTER *v.* BERRY **Warrington J. 895**

9. —— *Directors—Retirement at Ordinary Meeting—Failure to hold Meeting—Remuneration—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 49.

Articles of association of a company provided that general meetings should be held once in every year at such time and place as might be prescribed by the directors; that at the ordinary meeting in 1906 all the directors should "retire from office"; and that the directors should be remunerated at a certain rate per annum. Sect. 49 of the Companies Act, 1862 (which was then in force), provided that a general meeting should be held once in every year. No general meeting

COMPANY—*continued.*

was held or called in the year 1906 or 1907, but the directors continued to act as such :—

Held, that the directors vacated office on December 31, 1906 (being the last day on which a general meeting for that year could have been held), and were not thereafter entitled to any remuneration until they were re-elected.

In re Great Northern Salt and Chemical Works (1890) 44 Ch. D. 472 distinguished.

On February 12, 1906, the directors passed a resolution that they should not accept any fees for their services rendered thereafter ; but on January 17, 1907, they passed another resolution that from that date onwards the directors should be entitled to their fees :—

Held, that a director appointed after January 17, 1907, was entitled to remuneration under the articles.

In 1905 the company agreed to sell all its undertaking and assets to another company, the consideration being fully-paid shares in a third company and the payment by the purchasing company to the selling company of the latter's debts up to 25,000*l.* These shares were allotted to the selling company, which gave a charge on them to the purchasing company to secure repayment of what had been paid by it in discharging the debts of the selling company beyond 25,000*l.* :—

Held, that the fact that after the sale the directors' duties were diminished did not disentitle them to receive the same remuneration in the future. *In re* CONSOLIDATED NICKEL MINES, LIMITED - - - **Sargant J. 883**

10. —— *Promoters—Sale of Lease "agreed to be granted"—No binding Agreement at Time—Lease afterwards granted—Claim by Company to apportion Contract—Fiduciary Position of Promoters — Articles of Association restricting Liability of Promoters.*

Promoters agreed to sell to a company incorporated for the purpose the benefit of a lease "agreed to be granted" to the promoters of certain premises, the purchase-money embracing that and other objects. At that date there was no agreement for a lease enforceable at law, but terms had been arranged and a lease was afterwards granted to the promoters pursuant to those terms and assigned by them to the company. In an action by the company claiming that the promoters were liable to make good to the company such part of the purchase-money as was attributable to the benefit of the lease "agreed to be granted" :—

Held by the Court of Appeal (affirming the decision of Sargant J.), that, whether or not the lease was properly described as a lease "agreed to be granted," the company having in fact obtained all that they bargained for, and no secret profit having been made by the promoters, the company were not entitled to any relief.

Held, also, by Sargant J., that in any case the objection was an objection to the entire contract, and that relief could not be granted by way of apportionment of the purchase-money.

COMPANY—*continued.*

Per Sargant J. : The company having been promoted with a view to a sale of the benefit of the lease to the company by the promoters, the latter were not trustees for the company in the ordinary sense so as to prevent them from selling at a profit to the company.

Per Sargant J. : Whether promoters are in fact acquiring any assets as trustees for a company is a question of fact ; and where the whole scheme has been that the promoters are to sell to the intended company at a profit the assets which they are acquiring, the natural inference of fact is that, qua those assets, they are not intending to be trustees for the company, but are intending to occupy the relationship to the company of vendors. This relationship when coupled with promotion involves certain fiduciary duties, but it only confuses matters to identify such a fiduciary relationship with ordinary out and out trusteeship.

Per Sargant J. : An article of association of a private company providing that the company shall enter into a prepared agreement with promoters, and that no objection shall be taken to it, and that no promoter or director shall be liable to account to the company for any profit or benefit derived by him thereunder by reason of his being interested therein or of the board of directors not being an independent board, and that every member of the company present and future shall be deemed to become a member on these terms, will not relieve the promoters from the general equitable obligations recognized and enforced in *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218. OMNIUM ELECTRIC PALACES, LIMITED *v.* BAINES – **C. A. 332**

11. —— *Prospectus—Expert's Report—Bona fide Report—Statements expressly based thereon —Contract to take Shares—Basis of Contract—Material Inaccuracy in Report and Statements—Rescission.*

Where a company issues a prospectus inviting applications for shares on the faith of bona fide statements of fact expressly based on the bona fide report of an expert, the accuracy of those statements is prima facie the basis of the contract.

If the company does not intend to contract on that basis, it must dissociate itself from the report in such clear and unambiguous terms as to warn intending applicants that it does not vouch for the accuracy of the report or any statement based thereon.

Otherwise, if the report proves to be inaccurate, any material inaccuracy in the company's statements, though based thereon, will be a ground for rescission.

In such a case, calculations of future profits based on the data of the report may amount to a material misrepresentation of fact.

Principles stated in *In re Reese River Silver Mining Co.* (1867) L. R. 2 Ch. 604 ; *In re British Burmah Lead Co.* (1887) 56 L. T. 815 ; *Karberg's Case* [1892] 3 Ch. 1 ; *Lynde* v. *Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch. 178 ; *Aaron's Reefs* v. *Twiss* [1896] A. C. 273 ; and *Mair* v. *Rio Grande*

COMPANY—*continued.*

Rubber Estates [1913] A. C. 853, discussed and applied.

Bentley & Co. v. *Black* (1893) 9 T. L. R. 580 distinguished. *In re* PACAYA RUBBER AND PRODUCE COMPANY, LIMITED. BURNS' APPLICATION - - - - **Astbury J. 542**

12. —— *Prospectus — Statement in Lieu of Prospectus — Misstatements and Omissions — Allotment of Shares—Void or voidable—Statutory Requirements—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 82 ; *s.* 87, *sub-s.* 2 ; *s.* 281.

If a statement in lieu of prospectus has been filed pursuant to s. 82 of the Companies (Consolidation) Act, 1908, and the registrar has given a certificate under s. 87, sub-s. 2, the company can proceed to allotment notwithstanding that the statement contains misstatements and omissions. The meaning of s. 82 is that where no prospectus is issued an applicant for shares shall be able to inspect some document having a similar object ; and any applicant who applies for shares on the faith of a filed statement has the same individual right of rescission in the case of misstatement or omission which he would have had if he had relied on a prospectus. The requirements of s. 82 about proceeding to an allotment, however, are satisfied by the mere filing of the statement, whether the particulars are or are not sufficiently supplied, and an allotment is not vitiated by their want of accuracy.

Decision of Warrington J. affirmed. *In re* BLAIR OPEN HEARTH FURNACE COMPANY, LIMITED - - - - - - **C. A. 390**

13. —— *Proxy—Appointment by Corporation —Common Seal—Foreign Company having no Seal—Power of Attorney — Validity — Articles of Association — Construction of Articles—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 68.

Articles of association provided that no person should be appointed a proxy who was not a member of the company, and by article 73 that no objection should be made to the validity of any vote except at the meeting or poll at which such vote should be tendered, and every vote not disallowed at such meeting or poll, and whether given personally or by proxy, should be deemed valid for all purposes whatsoever. Proxies had been given to A., who was not a member of the company, and failing him to B., who was a member. A. voted under these proxies and no objection was taken at the time :—

Held, that the validity of these votes could not be afterwards disputed.

A vote given by the representative of a company under a resolution passed pursuant to s. 68 of the Companies (Consolidation) Act, 1908, can be properly admitted by the chairman on the evidence afforded by a copy of such resolution.

Articles of association of an English company provided by article 75 that " the instrument appointing a proxy shall be in writing under the hand of the appointer or his

COMPANY—*continued.*

attorney duly authorised in that behalf, or, if such appointer is a corporation, under its common seal." A South African company having no common seal and not required to have one was a shareholder in the English company, and by writing under the hands of two directors appointed an attorney in England to vote on its behalf, with power of substitution. Acting under this power the attorney appointed himself proxy in the form prescribed by the articles and claimed to vote either under the power of attorney or under the proxy. The chairman rejected this vote :—

Held, that the requirement of a common seal in article 75 only applied to corporations having a common seal according to English law, and that the attorney of the South African company was entitled to vote at any rate under the proxy if not under the power of attorney itself. COLONIAL GOLD REEF, LIMITED *v.* FREE STATE RAND, LIMITED **Sargant J. 382**

14. —— *Light Railway Company—" Share Capital," Meaning of — Directors — Casual Vacancy—Power of Election by sole remaining Director—Appointment of Unqualified Persons—Irregularity in allotting Shares—Validation of Irregular Acts—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14—17, 81, 85, 89, 90, 92, 99.

A light railway company was incorporated by an Order, confirmed by the Board of Trade, under the Light Railways Act, 1896. This Order incorporated the provisions of the Companies Clauses Consolidation Act, 1845, and provided that the quorum for a general meeting should be five shareholders holding together not less than one twentieth " of the share capital of the company " ; that the number of directors should be five, but that the company might vary the number if it was not less than three or more than seven ; that the qualification of a director should be not less than 250*l.* in the share capital ; that the quorum at a directors' meeting should be three, but that if the number was reduced to three the quorum should be two ; that P., J., and C. and two other persons nominated by them should be the first directors, and should continue in office until the first ordinary meeting, when the shareholders might continue in office the five directors or any of them, or elect a new board ; and that the capital of the company should be 60,000*l.* in 6000 shares of 10*l.* each. P., J., and C. never nominated any other directors, but allotted to each of themselves his qualifying shares, namely, twenty-five shares, and also one share each to four other persons. At the first ordinary meeting (at which only P., J., and C. and two of the four other persons were present) a resolution was passed reducing the number of directors to three and continuing P., J., and C. in office. On a later day P. and C. ceased to be directors, but before doing so each of them executed a transfer of his twenty-five shares to a colliery company ; the transfers were passed at a board meeting and the colliery company was registered as the holder of

COMPANY—*continued.*

the fifty shares. Subsequently J. purported to appoint X. and Y. directors of the railway company. X. then held only one share in the railway company and Y. held no share therein, but later on at the same meeting J., X., and Y. (acting bona fide and in the belief that the appointment of directors subject to their at once acquiring their qualification shares was good) purported to allot twenty-four shares to X. and twenty-five shares to Y. Shortly afterwards the colliery company transferred its fifty shares to S. and B. :—

Held (in an action by the colliery company and S. and B. against the railway company, J., X., and Y.), (1.) that one twentieth of "the share capital" meant one twentieth of the issued share capital, and therefore that the resolution of the ordinary meeting was valid ; (2.) that, although the power to elect directors in the case of casual vacancies was, by s. 89 of the Act of 1845, given to "the remaining directors," it was unnecessary, in order that the power should be exercised, that there should be in office the number of directors prescribed by the Order, and, therefore, that J. had the power to elect new directors ; (3.) that by s. 85 of the Act of 1845, the holding of the required qualification shares was a condition precedent to the election of a director, and, therefore, that X. and Y. had not been duly appointed and could not act as directors ; (4.) that the irregular allotment of the shares to X. and Y. was validated by s. 99 of the Act of 1845 ; (5.) that S. and B. were entitled to have the register of shareholders rectified by inserting their names as holders of the shares transferred to them ; and (6.) that J. must be ordered to convene a general meeting at an early convenient date. CHANNEL COLLIERIES TRUST, LIMITED *v.* DOVER, ST. MARGARET'S AND MARTIN MILL LIGHT RAILWAY COMPANY - - - - - - **Sargant J. 568**

15. —— *Shares—Contract to give Vendor fully-paid Shares on each Increase of Capital—Joint Stock Companies Act*, 1856 (19 *&* 20 *Vict. c.* 47), *ss.* 5, 61—*Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 8, 38—*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 3, 123.

A company, limited by shares and incorporated either under the Joint Stock Companies Act, 1856, or the Companies Act, 1862, cannot, for a fixed present consideration, validly contract that an indefinite amount of further share capital shall from time to time be issued upon the terms that all liability thereon for calls shall be at once extinguished without any contemporaneous payment by the allottees.

A company, limited by shares and incorporated under the Joint Stock Companies Act, 1856, was by its articles of association authorized to enter into an agreement with G. By this agreement, which was entered into immediately after the incorporation, it was agreed that a concession granted to G. for the supply of gas to a city in China should be transferred and sold to the company free from any competition by the vendor ; that in case the vendor should acquire any like concessions for any other places in China he would not dispose thereof to any other party without first giving the company an opportunity of acquiring them upon the same terms ; that the company would within three months allot to the vendor 400 shares of 10*l.* each in the company's capital (not exceeding 20,000*l.*), and would provide 4000*l.* to be immediately applied in paying up the 400 shares in full, and (clause 8) that "if and whenever the amount of the company's paid up capital shall be increased above the sum of 20,000*l.*, the company will allot to G., his executors, administrators and assigns, such further number of shares as shall be equal to one-fifth part of the increased capital so from time to time actually paid up beyond the said sum of 20,000*l.*, and will pay to him or them, or to" certain named persons, "as the nominees of him or them, a sum equal to the nominal amount of the shares so allotted to him or them, which sum or sums so paid shall from time to time be immediately applied in paying up in full the shares so allotted." The transfer to the company was carried out, and the 400 shares were allotted and paid up according to the agreement. Further issues of shares were made in subsequent years, when the claim of G. to receive one-fifth of each increase of capital was recognized, and in respect of such shares as he took, the amounts were paid up with moneys of the company. G. having died, an action was brought for the decision of the question whether the company was bound to allot to his executors one-fifth of each future increase of capital, and, if so, on what terms :—

Held, that clause 8 was good so far as it created an obligation to allot to the vendor, his executors, administrators, or assigns, one-fifth of the increased capital from time to time, but bad so far as it purported to relieve the allottee or allottees from liability to pay up all or any part of the nominal amount of such share capital. HONG KONG AND CHINA GAS COMPANY, LIMITED *v.* GLEN

Sargant J. 527

16. —— *Winding-up—Examination under s.* 174—*Power to order Examination in open Court — Jurisdiction — Discretion — Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 174—*Companies* (*Winding-up*) *Rules*, 1909, *r.* 5, *sub-r.* 2.

Although (*semble*) the Court may have jurisdiction under r. 5, sub-r. 2, of the Companies (Winding-up) Rules, 1909, to order an examination under s. 174 of the Companies (Consolidation) Act, 1908, to be held in open Court, the jurisdiction should only be exercised in very exceptional circumstances. For instance, a person not charged with fraud should not be ordered to be examined in open Court.

In re Great Kruger Gold Mining Co. [1892] 3 Ch. 307 ; *Haddock's Case* [1902] 2 Ch. 73 ; *Ex parte Barnes* [1896] A. C. 146 ; and *In re John Tweddle & Co.* [1910] 2 K. B. 697, applied.

In re New Zealand Loan and Mercantile Agency Co. (1894) 10 Times L. R. 371, 379,

COMPANY—*continued.*

distinguished. *In re* PROPERTY INSURANCE COMPANY, LIMITED – – Astbury J. 775

17. —— *Winding-up—Practice—Taxation of Costs — Costs incurred before Winding-up — Taxation in Winding-up or under the Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73).

This company was ordered to be wound up compulsorily in September, 1909. At that date the company's solicitors had in their hands large sums of money belonging to the company. They repaid a considerable amount to the company or the liquidator, but retained 471*l.* against which they claimed to set off their costs incurred before the winding-up. The official receiver, who was liquidator, took out a summons for delivery of a bill of costs and cash account, taxation, and payment. The registrar made an order, which the solicitors did not oppose, for delivery of a bill of costs and cash account only. The solicitors delivered them, shewing a balance due from them to the company of 13*l.* The official receiver then brought the summons on again for an order for taxation in the winding-up and payment. The solicitors resisted the application, claiming to have their costs taxed under the Solicitors Act, 1843:—

Held by the Court of Appeal (Lord Reading C.J. and Buckley L.J.), that the solicitors in this case by submitting to the order to deliver a bill of costs had submitted to the jurisdiction for a proper consequential order for taxation and payment in the winding-up. A judge sitting in winding-up matters has jurisdiction to make an order for taxation of costs incurred before the winding-up either under the Solicitors Act, 1843, or in the winding-up.

Decision of Astbury J. affirmed. *In re* PALACE RESTAURANTS, LIMITED – C. A. 492

18. —— *Winding-up — Surplus Assets—Preference Shares—Dividend at stated Percentage—Amount of paid-up Capital to be returned—Claim to further Share of Surplus—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 186.

Either with regard to dividend payable while a company is a going concern, or with regard to rights in a winding-up, the express gift or attachment to preference shares, on their creation, of preferential rights, whether in respect of dividend or return of capital, is, prima facie, a definition of the whole of their rights in these respects, and negatives any further or other right to which, but for the specified rights, they would have been entitled.

Articles of association of a company entitled the holders of its first preference shares "to receive a preferential cumulative dividend of 6 per cent. per annum, and no more, on the amount for the time being paid up . . . . thereon, out of the profits of the company, and to the preferential repayment of the amount paid up . . . . on any such shares, out of the assets of the company in the event of the company being wound up . . . . in priority to any payment in respect of the ordinary shares of the company, but to no other participation in profits."

COMPANY—*continued.*

Second preference shares were created, on an increase of capital, by a resolution which provided that "the holders thereof (subject to the payment of the preferential dividend on the original preference shares)" should "be entitled to a cumulative preferential dividend at the rate of 6 per cent. per annum," and that, after the ordinary shares had received 6 per cent. per annum out of the profits of each year, "the second preference shares and the ordinary shares shall participate rateably, according to the amounts paid up thereon, in any surplus profits." The resolution also provided that "in the event of the company being wound up, the surplus assets thereof shall be applied in the first place in repaying to the holders of the original preference shares the full amount paid up thereon, and, subject thereto, in repaying to the holders of the second preference shares the full amount paid up thereon, in priority to any payment in respect of the ordinary shares."

After the first and second preference shares had been issued the company adopted a new set of articles, one of which provided that if on winding up the "surplus assets shall be more than sufficient to repay the whole of the paid-up capital, then, subject as to any new shares to the special terms upon which they may be issued, the excess shall be distributed among the members in proportion to the capital paid . . . . on the shares, other than first and second preference shares held by them respectively, at the commencement of the winding-up . . . . But this clause is to be without prejudice to the rights of the holders of the first and second preference shares, and any other shares issued upon special conditions."

After the adoption of the new articles a number of unissued ordinary shares were (pursuant to a resolution) issued upon the terms that the holders should "be entitled to a non-cumulative dividend at the rate of 5 per cent. per annum on the amount paid up thereon," and that, "in the event of the winding-up of the company," the surplus assets thereof should be applied first in repaying to the holders of the first and second preference shares the full amount paid up thereon, and that "such surplus assets shall next be applied in repaying to the holders of the third preference shares . . . . the full amount paid up thereon."

The remaining ordinary shares were issued on the terms that when fully paid they should be converted into two classes of stock, of which one, called "preferred stock," was, as between the two classes, to carry a fixed cumulative dividend of 6 per cent. per annum on the capital paid up thereon, and in the event of winding up was to rank for repayment of capital, together with a bonus of 5 per cent., in priority to the other class, called "the deferred stock," and that the deferred stock was to "confer a right to the surplus profits, and, in the event of a winding-up, to the surplus assets of the company to which the ordinary shares would, but for the said conversion, have been entitled."

COMPANY—*continued.*

In the voluntary winding-up of the company, after satisfaction of its liabilities, and repayment to all the share and stock holders of the capital paid up by them, and payment to the preferred stockholders of their 5 per cent. bonus, there remained for distribution a surplus consisting of the remains of a reserve fund which had not been capitalized, and which, while the company was a going concern, might have been distributed as dividend:—

Held, that the claims of the first, second, and third preference shareholders had been satisfied by the return to them of their paid-up capital, inasmuch as in each case there was an implied negativing of any right to receive more than their dividend at the specified rate up to the winding-up, and a return of their paid-up capital on winding-up; that the preferred stockholders' claims had also been fully satisfied; and that the deferred stockholders were entitled to the whole of the fund. *In re* NATIONAL TELEPHONE COMPANY **Sargant J. 755**

—— Auditors — Duties — Legal knowledge — Balance-sheet — Ultra vires payments - - - - - 139
See INTERNATIONAL LAW.

—— Fixtures — Hire-purchase agreement — Equitable interest — Debentures — Receiver — Possession — Priorities — Right of vendor of fixtures to remove - 50
See FIXTURES.

—— Gas.
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—— Will—Residue—Trust for sale and conversion—Power to postpone—Shares in limited company - - - 192
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COMPOUND SETTLEMENT -Trustees for the purposes of the Settled Land Acts- 110
See SETTLEMENT. 4.

CONDITIONS — Company — Debenture — Place fixed for payment of principal—Default in payment of interest—Demand at place—Limit of borrowing power—Excess—Pleading - - - 920
See COMPANY. 3.

CONFLICT OF LAWS -*Scottish Instrument comprising Scottish and English Land—Heirs-male of the Body in Fee—Lex Loci—Estate in Tail Male in English Land.*

By trust disposition made in Scottish form and executed in manner required by English law for the execution of wills, W. M. gave his whole estate, real and personal, to trustees, to allow his wife (who died in 1912) the liferent use of his mansion-house No. 1, Park Lane, London, and subject thereto directed his trustees to hold his estate of Manderson in Scotland, as also his house No. 1, Park Lane, with the whole pictures, books, linen and household plenishing of every description in the mansion house of Manderson and in No. 1, Park Lane, and his silver plate, wherever it might be, for behoof of his eldest son, James, "and the heirs-male of his body in fee"; whom failing, John, his second son, "and the heirs-male of his body in fee," with divers limitations over.

W. M., who was seised of No. 1, Park Lane, for an estate in fee simple, died in 1887. James died in 1906, without issue and without having executed any disentailing assurance of No. 1, Park Lane, but having made a trust disposition in Scottish form executed in manner required by English law for the execution of wills, by which he disposed of the whole of his real and personal estate.

Evidence of the law of Scotland applicable to the circumstances was given to the effect that the terms of the trust disposition of W. M. were ineffectual to create a strict entail; that the interest of John and his heirs thereunder was that of heirs substitute only, and was defeasible at the will of James, who was entitled (subject only to the life interest of his mother) to deal with or dispose of the premises by any habile conveyance either inter vivos or mortis causa; and that by his trust disposition James had according to the law of Scotland effectually disposed of the premises:—

Held, that as to No. 1, Park Lane the trust disposition of W. M. created an estate in tail male in James without any power of disposition other than that conferred by English law, and that, in the events which had happened, No. 1, Park Lane passed to John for an estate in tail male.

Studd v. *Cook* (1883) 8 App. Cas. 577 distinguished. *In re* SIR WILLIAM MILLER. *In re* SIR JAMES MILLER. BAILIE *v.* MILLER. **Warrington J. 511**

CONSECRATION OF CHURCHYARDS ACT, 1867 - - - - - - 808
See BURIAL.

CONSENT—Covenant not to underlet without consent—Withholding consent—Time—Underlease without consent - 782
See LANDLORD AND TENANT. 1.

CONTRACT—*Memorandum in Writing—Signature by Agent "lawfully authorized"—Solicitor—Sale of Land—Part Performance—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

The Statute of Frauds may be satisfied as completely by a note or memorandum, signed by an agent, of the terms contained in a verbal contract, as by a note or memorandum signed by the principal himself, provided the agent had authority to sign the particular note or memorandum; and the fact that the agent was not authorized or intended to bind his principal by a contract is immaterial.

T. verbally agreed with G. for the purchase of land for 700*l.*, and paid a deposit to and obtained a receipt therefor from G., but did not sign any document himself. G. at the time was acting for D., who was the owner of the property and the undisclosed principal, but afterwards alleged that he had agreed to buy the land from D. for 600*l.* and

CONTRACT—*continued.*
that he was contracting with T. on his own account and sub-selling to him at an increased price. G. having commenced an action against D. (*G.* v. *D.*) for specific performance of the alleged agreement between them, X. & Co., the solicitors for D., being desirous of obtaining a proof of T.'s evidence in that action, wrote to Y. & Co., the solicitors for T., asking for a short statement from their client (T.) as to what had occurred between G. and T. Y. & Co. returned a statement by T. as to the verbal agreement with G., but this was considered insufficient. X. & Co. then wrote to Y. & Co. asking for replies to certain questions to be answered by T., and Y. & Co. replied, in a letter signed by them, saying that they enclosed the questions with the answers of T. (which were made but not signed by him). The statement first sent, the answers to the questions, and the two letters from Y. & Co. contained materials sufficient to constitute a note or memorandum of the contract within s. 4 of the Statute of Frauds. The action of *G.* v. *D.* having been dismissed, D. brought an action against T. for specific performance of T.'s contract to buy the land :—

Held, (1.) that Y. & Co. were acting in the matter as agents for T. ; (2.) that Y. & Co. had authority to sign the particular note or memorandum on behalf of T. ; and (3.) that, although Y. & Co. were not authorized and did not intend to bind T. by any contract, there was a sufficient note or memorandum to satisfy s. 4 of the Statute of Frauds.

Smith v. *Webster* (1876) 3 Ch. D. 49 distinguished.

During the negotiations and after the completion of arrangements for the conveyance of the land to T., his solicitors, Y. & Co., asked X. & Co., the solicitors of D., to get rid of two weekly tenants who were in possession. X. & Co. accordingly gave notice to the tenants, who gave up possession :—

Held, that this was an act of part performance as unequivocally referring to the contract as if T. had himself taken possession, and was sufficient in itself to take the case out of the statute. DANIELS *v.* TREFUSIS.
Sargant J. 788

—— Company.
See under COMPANY.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

CONTRACT OF SERVICE—Restraint of trade.
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CONVERSION—Trust for—Power to postpone—Shares in residue—Advances in lifetime of testator—Subsequent advances by trustees — Hotchpot — Difficulty of realizing estate - - - - **358**
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—— Will—Residue—Trust for sale and conversion—Power to postpone—Shares in limited company - - - **192**
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CONVEYANCE—Parcels—Plan—Falsa demonstratio - - - - - **68**
See VENDOR AND PURCHASER. 1.

CONVEYANCING AND LAW OF PROPERTY—Conveyance — Parcels — Plan — Falsa demonstratio - - - - **68**
See VENDOR AND PURCHASER. 1.

CORPORATION—*Successors and Assigns—Undertaking—Assignment—Dissolution—Reversion to Grantors—Liability to perform Statutory Obligations—Marginal Notes to Act of Parliament.*

In 1777 an Act of Parliament was passed for making a canal. It incorporated a company by name of the Company of Proprietors of the Basingstoke Canal Navigation, authorized them to construct the canal, to make by-laws, demand tolls, and acquire land. All persons were to have the right to use the canal on payment of tolls. The company were to make and maintain bridges. Throughout the Act in conferring rights or imposing obligations on the company the words "their successors and assigns" were added.

The canal was made and navigation carried on till 1866, when a winding-up order was made. In 1874 the liquidator with the sanction of the judge sold the canal to S. A. The word "undertaking" was not used in the conveyance, but possession was taken, and tolls levied and received. In 1878 the company was dissolved by an order of the Court. S. A. sold various portions of the land, and the last purchaser of the canal and undertaking was the L. and S. W. Canal, Limited, which executed a mortgage thereof to W. Carter.

The canal bridges fell into disrepair, and the Woking Urban District Council obtained an Act of Parliament in 1911 which authorized them to do the repairs and recover the costs from "the company" :—

Held (reversing the decision of Sargant J.), that the company had no power to assign their undertaking ; nothing passed to S. A. by the conveyance of 1874 ; on the dissolution the land of the company reverted to the original grantors, and as they made no claim to it their right of entry had been barred by the Statute of Limitations ; S. A. had thus acquired the legal fee simple in the canal free from any of the obligations or rights of the company ; the L. and S. W. Canal, Limited, were owners of the canal, but were not bound to keep it up or do repairs, and could not demand tolls ; the Act of 1911 did not impose any fresh liability ; and no liability attached upon either the L. and S. W. Canal, Limited, or Carter.

Semble per Phillimore L.J. : In some private Acts of Parliament the marginal notes may form part of the Act. *In re* WOKING URBAN DISTRICT COUNCIL (BASINGSTOKE CANAL) ACT, 1911 - - - - **C. A. 300**

—— Proxy—Appointment by corporation—Common seal—Foreign company having no seal—Power of attorney—Validity
See COMPANY. 13. **382**

COSTS — Company — Debentures — Trust deed — Remuneration of trustees — Appointment of receiver — Extent of right to remuneration – – – – 687
See COMPANY. 7.

—— Company — Winding-up — Practice — Taxation of costs — Costs incurred before winding-up — Taxation in winding-up or under the Solicitors Act, 1843 – 492
See COMPANY. 17.

—— Lunacy — Lunatic not so found by inquisition — Receiver — Quasi-committee — Solicitor appointed by quasi-committee — Costs — Delay in payment — Personal liability of quasi-committee — Statute of Limitations — Application by solicitor 927
See LUNACY. 1.

—— Maintenance of suit — Common interest — Trade union — Slander on officer as such — Action by officer — Indemnity by union against costs — Ultra vires – – 98
See MAINTENANCE OF SUIT.

—— Practice — Striking out pleadings — Action by lunatic not so found — Lunacy not admitted in defence — Relevant issue at trial — Authority of solicitors of plaintiff to bring action – – – – 968
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—— Settled land — Costs of proceedings proposed to be taken for the recovery of land — Benefit to estate — Proceedings abandoned – – – – 77
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—— Way, Right of — Obstruction by gates — Damages in lieu of injunction — Payment into Court with denial of liability – 704
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COVENANT — After-acquired property, Covenant to settle — "Interest in expectancy"
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—— Executor — Devastavit — Statute of Limitations — Trustee Act, 1888 — Liability under covenants in lease – – 233
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—— Not to underlet without consent — Withholding consent — Time — Underlease without consent – – – – 782
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—— Restraint of trade — Severance of covenant — Reasonableness — Nature of business — Area of restraint — Time limit of one year – – – – – – 413
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—— Restrictive covenant, whether enforceable — Contract for sale of land — Restrictive stipulation for benefit of adjoining lands of vendor — Adjoining lands sold before completion of contract – – 34
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CREDITORS — Executor — Insolvent estate — Preferment of creditors – – – 742
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CREDITORS—*continued.*

—— Executors — Assets of testator — No power to carry on business — Business carried on by executors — Executors' right to indemnity — Rights of creditors – 604
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—— Goodwill — Assignor — Deed of assignment for benefit of creditors — Compulsory alienation — Sale of business and goodwill by trustee — Solicitation of old customers by assignor – – 562
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CUSTODIAN TRUSTEE — Public Trustee Act, 1906, ss. 2, 4 – – – – – 83
See CHARITY. 2.

CY PRÈS — Charitable society, Bequests to — Construction — Maintenance annuity applicable cy près – – – 427
See CHARITY. 1.

DAMAGES — Way, Right of — Obstruction by gates — Damages in lieu of injunction — Payment into Court with denial of liability — Costs – – – 704
See WAY, RIGHT OF.

DAUGHTER — Will — Latent ambiguity — Gift to husband and wife and "their daughter" — Five daughters — Extrinsic evidence
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DEBENTURE-HOLDERS AND DEBENTURES — Company.
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DEBTS — Executor — Insolvent estate — Preferment of creditors – – – 742
See ADMINISTRATION. 2.

—— Will — General charge of debts (including mortgage debts) — Specific devises — Exoneration — Real Estate Charges Acts – – – – – – 278
See WILL. 7.

DECLARATION OF TITLE — Ferry — Franchise — Presumption of lost grant — Disturbance – – – – – – 822
See FERRY.

DEED — *Construction — Mines and Minerals — Title — Lease — Conveyance of Reversion — Severance — Rent — Apportionment — Statute of Limitations — Real Property Limitation Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 9.

In 1740 the defendant's predecessors in title granted to the predecessors of the B. colliery company a lease of the coal and cannel under certain lands for a term of 200 years at a rent of 50*l.* for such coal or cannel as should be raised by ten getters, and proportionately after that rate for any additional number of getters. By two indentures dated in 1791 the defendant's predecessors in title assured to the predecessors in title of the plaintiff portions of the land to which the minerals comprised in the lease of 1740 were subjacent. Neither of these indentures contained any exception of mines or minerals, and no mention of the lease of 1740 was made

DEED—*continued.*
in either of them, except in the vendor's covenant against incumbrances, from the operation of which it was excepted. In 1828 part of the land comprised in the indentures of 1791 was conveyed back to the defendant's then predecessor in title, and in exchange therefor he granted to the plaintiff's then predecessors certain other lands to which minerals comprised in the lease of 1740 were subjacent. In this deed there was again no exception of mines or minerals, but the grant was made subject to the lease of the coal mines then vested in the B. colliery company. The defendant, who was the successor in title of the original grantors of the lease of 1740, received during his tenure of the property the whole of the rents paid by the colliery company under the lease.

In an action by the plaintiff, as tenant for life of the lands comprised in the indentures of 1791 and 1828, claiming a declaration that she was entitled for life to the mines and minerals thereunder subject to the lease of 1740, and to have an account taken of her proportion of the rents received by the defendant from the B. colliery company, the defendant contended (1.) that the reversion of the minerals demised by the lease of 1740 was not comprised in the various conveyances of 1791 and 1828 or any of them; (2.) that the rent reserved by the lease was not apportionable; and (3.) that the plaintiff's claim was barred by s. 9 of the Real Property Limitation Act, 1833:—

Held by the Court of Appeal, affirming the decision of Eve J., (1.) that the reversion of the minerals expectant on the termination of the lease was not excepted from the conveyances of 1791 and 1828; (2.) that the reversion was severed by each of those conveyances, and that on each such severance the rent reserved by the lease became apportionable; (3.) that the rent was a dead rent and not a royalty, and that, inasmuch as there had never been any wrongful receipt by the defendant or his predecessors of the rent, time had never begun to run under s. 9 of the Act of 1833:—

Held, therefore, that the plaintiff was entitled to recover her proper proportion of the rents received by the defendant limited to six years before the commencement of the action

Laybourn v. *Gridley* (1892) 61 L. J. (Ch.) 352 is not inconsistent with *Williams* v. *Pott* (1871) L. R. 12 Eq. 149. MITCHELL *v.* MOSLEY **C. A. 438**

DEED OF ASSIGNMENT—Goodwill—Assignor—Deed of assignment for benefit of creditors—Compulsory alienation—Sale of business and goodwill by trustee—Solicitation of old customers by assignor – – – – – – **562**
See GOODWILL.

DEED POLL—Will—Construction—Life tenant—Power to apply corpus for his own benefit—Appointment by deed poll—Absolute interest – – – **865**
See WILL. 11.

DETERMINATION — Landlord and tenant — Lease for five years—Construction—Proviso—Determination "after expiration of first three years"—Notice—Validity – – – – **522**
See LANDLORD AND TENANT. 3.

DEVASTAVIT—Executor—Statute of Limitations — Trustee Act, 1888 — Liability under covenants in lease – – **233**
See ADMINISTRATION. 1.

DIPLOMATIC AGENT — Privilege — Waiver — Diplomatic Privileges Act, 1708 – **139**
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DIPLOMATIC PRIVILEGES ACT, 1708 – **139**
See INTERNATIONAL LAW.

DIRECTORS—Company.
See under COMPANY.

DISCLAIMER — Married woman — Personal estate—Bequest of annuity for separate use without power of anticipation—Right to disclaim – – – **502**
See HUSBAND AND WIFE.

DISCOVERY — *Interrogatories — Patent — Infringement—Names of Manufacturers of Infringing Articles—Principle on which Interrogatories allowed—Practice.*

In an action to restrain an alleged infringement of a patent it is legitimate to save labour and expense by means of interrogatories directed to obtain admissions of facts which the party interrogating must prove in order to establish his case; but it is not legitimate where the admissions sought relate to facts which it is not incumbent on the interrogating party to prove, but which, if proved, may assist him in proving those facts on the proof of which his right to relief depends. OSRAM LAMP WORKS, LIMITED *v.* GABRIEL LAMP COMPANY – – – – **Eve J. 699**

DISCRETION—Company—Winding up—Power to order examination in open Court—Jurisdiction – – – – **775**
See COMPANY. 16.

—— Trustees.
See under TRUSTEE.

DISQUALIFICATION—Solicitor — Profession — Admission of women—Inveterate usage
See SOLICITOR. **286**

DISTRIBUTION — Trustee — Distribution of estate in specie—Mortgage security—Interest duly paid—No suspicion of jeopardy — Mortgage properly retained —No valuation of mortgage—Appropriation of mortgage to settled share—Mortgage in fact worthless at date of appropriation—Liability of trustee **558**
See TRUSTEE. 3.

DIVIDEND — Company — Winding-up — Surplus assets—Preference shares—Dividend at stated percentage – – – **755**
See COMPANY. 18.

"DOMESTIC SERVANT"—Meaning of "domestic"—Male nurse—Temporary suspension of service—Will—Legacy - 682
See WILL. 8.

DUTY—Legacy duty—French mutation duty
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EASEMENT—Light.
See under LIGHT.

—— Way, Right of
See under WAY, RIGHT OF.

ELECTION — Company — Directors — Casual vacancy — Power of election by sole remaining director — Appointment of unqualified persons — Irregularity in allotting shares—Meaning of "share capital"—Light railway company 568
See COMPANY. 14.

ESTATE OFFICE — Settled land — Authorized improvement—Necessary ancillary improvement — Conversion of land into building land - - - - 227
See SETTLED LAND. 1.

ESTATE TAIL — Conflict of laws — Scottish instrument comprising Scottish and English land—Heirs-male of the body in fee—Lex loci—Estate in tail male in English land - - - - 511
See CONFLICT OF LAWS.

—— Lunatic—Real estate—Committee—Power to bar lunatic's estate tail—Resettlement - - - - - - 618
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EVIDENCE—Wall—Demise of room—Right to outside wall - - - - 213
See LANDLORD AND TENANT. 2.

—— Extrinsic—Will—Latent ambiguity—Gift to husband and wife and "their daughter"—Five daughters - 375
See WILL. 2.

—— Will—Construction—Parol evidence—Sufficiency—Secret trust—Communication to one of two trustees—Trustee a beneficiary - - - - - 662
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EXAMINATION — Company — Winding-up — Power to order examination in open Court—Jurisdiction—Discretion - 775
See COMPANY. 16.

EXECUTORS—Administration—Assets of testator—No power to carry on business—Business carried on by executors—Executors' right to indemnity—Rights of creditors - - - - 604
See ADMINISTRATION. 3.

—— Administration—Insolvent estate—Preferment of creditors—Payment of debts to amount in excess of assets in hand—Right of executor to recoup himself out of subsequent assets - - 742
See ADMINISTRATION. 2.

—— Devastavit — Statute of Limitations — Trustee Act, 1888—Liability under covenants in lease - - - 233
See ADMINISTRATION. 1.

EXONERATION—Will—General charge of debts (including mortgage debts)—Specific devises - - - - - 278
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EXPECTANCY—"Interest in expectancy"—Covenant to settle after-acquired property - - - - - 115
See SETTLEMENT. 1.

EXPERT — Company — Prospectus — Expert's report—Bona fide reports—Statements expressly based thereon—Contract to take shares—Basis of contract—Material inaccuracy in report and statements—Rescission - - - - 542
See COMPANY. 11.

EXTRINSIC EVIDENCE.
See under EVIDENCE.

FALSA DEMONSTRATIO—Conveyance—Parcels—Plan - - - - - 68
See VENDOR AND PURCHASER. 1.

FERRY—*Franchise—Presumption of Lost Grant—Disturbance—Change of Circumstances—New Traffic—Landing Place—Highway—Pleasure Traffic—Declaration of Title—Rules of the Supreme Court, Order* XXV., *r.* 5.

In an action for a declaration that the plaintiffs were entitled to an ancient ferry and an injunction to restrain the defendants from disturbing them in the enjoyment thereof:—

Held by Cozens-Hardy M.R. and Phillimore L.J. (dissentiente Buckley L.J.), that the plaintiffs were entitled to an ancient ferry and that a declaration to that effect ought to be made; that no new traffic had arisen which could justify the defendants in setting up another ferry near the plaintiffs'; that an injunction ought to be granted to restrain them from doing so; and that, in order to establish the existence of an ancient ferry from point to point sufficiently to enable the Court to presume a lost grant from the Crown of a franchise ferry, it is enough to shew that one of the points is on a public highway, and that the claimant could and did give to persons using the ferry leave to land at the other point and access therefrom to a highway.

Held, also, by the whole Court, that where such an action is dismissed on the ground that there has been no disturbance of the ferry, a declaration of the plaintiffs' title ought not to be made.

Decision of Warrington J. reversed. EARL OF DYSART *v.* HAMMERTON & Co. - C. A. 822

FINES AND RECOVERIES ACT, 1833, s. 15 618
See LUNACY. 2.

FIRE INSURANCE.
See under INSURANCE (FIRE).

FIXTURES—*Hire-purchase Agreement—Equitable Interest—Debentures—Receiver—Possession—Priorities—Right of Vendor of Fixtures to remove.*

By an agreement in writing, dated November 11, 1910, G. M. & Co., Limited, agreed to

FIXTURES—*continued.*
supply and erect upon the works owned by the firm of M., J. & Co. (the predecessors of the defendant company) a complete installation of a patent automatic sprinkler for the protection of the premises from fire, at the price of 237*l.*, payable by annual instalments. In the event of default being made in any annual instalment, or of any breach of the agreement by the purchasers, the whole unpaid balance of principal and interest was immediately to become due. The agreement further provided that the basis of the contract was that the sprinkler installation remained the sole and exclusive property of the contractors until the whole sum of 237*l.* had been paid, and in the event of default the contractors might enter upon the premises and remove the installation. The defendant company was incorporated in 1911 and took over the assets and liabilities of the firm of M., J. & Co., including their interest under the agreement. In December, 1911, the defendant company issued a series of first mortgage debentures containing a charge in the usual form of the undertaking, such charge to be a floating security. On October 18, 1912, a receiver and manager was appointed in an action brought by the debenture-holders to enforce their security. On October 21 the last instalment under the agreement fell due and was not paid. The debenture-holders had no notice of the agreement.

On an application by G. M. & Co., Limited, for liberty to enter upon the defendant company's premises and remove therefrom the sprinkler installation:—

Held by Eve J. and by the Court of Appeal, that the effect of the hire-purchase agreement was to confer upon the applicants an interest in the land to which the sprinkler installation was affixed and to authorize them, in the events which had happened, to enter and remove it; that the interest of the debenture-holders being also equitable the ordinary principles of priorities applied; and that that interest being subsequent in date was therefore postponed to the interest of the applicants.

Rule laid down by Parker J. in *In re Samuel Allen & Sons, Ld.* [1907] 1 Ch. 575, 582, approved and adopted. *In re* MORRISON, JONES & TAYLOR, LIMITED. COOKES *v.* MORRISON, JONES & TAYLOR, LIMITED
C. A. 50

FLOATING CHARGE—Company—Debentures
See COMPANY. 5. 800

—— Company — Debentures — Pari passu—Interest — Distribution of assets in debenture-holder's action – – 41
See COMPANY. 4.

FLOATING SECURITY—Company—Debenture—Covenant for payment on specified day—Winding up of company before such day—Debenture-holders' action—Appointment of receiver – – 954
See COMPANY. 6.

FOREIGN COMPANY—Proxy—Appointment by corporation — Common seal — Foreign company having no seal—Power of attorney—Validity – – – 382
See COMPANY. 13.

FOREIGN FIRM — Practice — Suing in firm's name—Service out of the jurisdiction 748
See PRACTICE. 2.

FOREIGN PROPERTY—Gift of, free of legacy duty—French mutation duty—Whether payable by specific legatee or executors
See WILL. 16. 847

FRANCHISE—Ferry—Presumption of lost grant — Disturbance — Change of circumstances—New traffic—Landing place—Highway—Pleasure traffic—Declaration of title – – – – – 822
See FERRY.

FRANCISCAN FRIARS — Gift in trust for—Validity—Roman Catholic Relief Act, 1829—Will—Construction – – 937
See WILL. 10.

FRAUDS, STATUTE OF—Contract—Memorandum in writing—Signature by agent "lawfully authorized"—Solicitor—Sale of land—Part performance – – 788
See CONTRACT.

FRAUDULENT PLEDGE—Mortgage—Redemption—Transfer of stock as collateral security — Fraudulent pledge of stock by mortgagee to bank — Mortgagor's right to redeem as against bank – 22
See MORTGAGE.

FRENCH LAW — Foreign firm — Practice — Suing in firm's name—Service out of the jurisdiction – – – – 748
See PRACTICE. 2.

—— Specific gift of foreign property free of legacy duty — French mutation duty —Whether payable by specific legatee or executors – – – – 847
See WILL. 16.

FUTURITY, WORDS OF—Will — Construction —Gift to children of child of testator who "shall die in my lifetime"—Child dead at date of will leaving children
See WILL. 18. 219

GAS—"*Main*" *or* "*service pipe*"—*Company*—*Local Government*—*Chesterfield Gas and Water Board Act*, 1895 (58 & 59 *Vict., c. cxlvii.*), *s.* 4.

The defendants were incorporated under the Chesterfield Gas and Water Board Act, 1895 (58 & 59 Vict. c. cxlvii.), for the purpose of acquiring the undertaking of the Chesterfield Waterworks and Gas Light Company, and by s. 4 of that Act the limits for the supply of gas and water were to be the existing limits of the company, and it was provided that it should not be lawful for the defendants "to extend the existing mains of the company" for the supply of gas in the parishes of B. and W. unless with the previous written consent of the plaintiffs.

GAS—*continued.*

In 1912 the defendants, without obtaining such consent, laid a two-inch pipe, eighty-eight yards in length, from one of the mains in their own district along a street in the parish of W. in order to supply gas to one consumer. The plaintiffs, who were a limited company formed to supply gas in the parishes of B. and W., brought their action for an injunction to restrain the defendants from allowing this pipe to remain, and from laying any pipes in the said parishes contrary to the proviso in the Act:—

Held, (1.) that the proviso in the Act of 1895 was limited in its operation to mains properly so called and distinct from service pipes; (2.) on the question of fact, that the eighty-eight yards length of pipe was laid down and was being used as a service pipe only, sufficient to satisfy the estimated maximum requirements of the particular consumer; and the action must therefore be dismissed. WHITTINGTON GAS LIGHT AND COKE COMPANY, LIMITED *v.* CHESTERFIELD GAS AND WATER BOARD – – **Eve J. 270**

GOODWILL—*Assignor—Deed of Assignment for Benefit of Creditors—Compulsory Alienation—Sale of Business and Goodwill by Trustee—Solicitation of Old Customers by Assignor.*

The general principle affirmed by the House of Lords in *Trego* v. *Hunt* [1896] A. C. 7, that a vendor who sells the goodwill of his business and receives the purchase-money cannot afterwards destroy that which he has sold by soliciting his former customers, does not apply to the case of a sale of a debtor's business by the trustee of a deed of assignment executed by the debtor for the benefit of creditors. In such a case the alienation being involuntary as in the case of a bankruptcy the exception established in *Walker* v. *Mottram* (1881) 19 Ch. D. 355 applies, and the debtor is not precluded from soliciting the customers of his old firm. GREEN & SONS (NORTHAMPTON), LIMITED *v.* MORRIS **Warrington J. 562**

GRANT—Ferry—Franchise—Presumption of lost grant—Disturbance—Change of circumstances – – – – **822**
See FERRY.

GUARANTEE SOCIETY—Liquidation of—Scheme of arrangement—Postponement of claims for principal—Interim partial payment of interest—Capital or income
See SETTLED ESTATE. **203**

HIGHWAY—Ferry—Franchise—Presumption of lost grant—Disturbance—Change of circumstances—New traffic—Landing place—Pleasure traffic—Declaration of title – – – – – – – **822**
See FERRY.

—— Obstruction of—Theatre—Collection of crowds before opening of doors—Access to adjacent premises—Injunction—Regulation by police – – – **631**
See NUISANCE.

HIGHWAY—*continued.*

—— Way, Right of.
See under WAY, RIGHT OF.

HIRE-PURCHASE AGREEMENT—Fixtures—Equitable interest—Debentures—Receiver—Possession—Priorities—Right of vendor of fixtures to remove – **50**
See FIXTURES.

HOTCHPOT—Trust for conversion—Power to postpone—Difficulty of realizing estate
See WILL. 6 **358**

HUSBAND AND WIFE—*Married Woman—Personal Estate—Bequest of Annuity for separate Use without Power of Anticipation—Right to disclaim—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1.

Since the passing of the Married Women's Property Act, 1882, which by s. 1 enables a married woman to acquire and hold property as a feme sole, a married woman is entitled to disclaim a gift to her by will or other disposition of personal property, notwithstanding that the property so given is subject to a restraint on anticipation.

Testatrix gave an annuity to a married woman, during her life for her separate use, without power of anticipation. The annuity was to commence from the death of the testatrix and to be paid quarterly, and the testatrix directed the defendants (whom she appointed executors and trustees of her will) to set apart a fund for securing the annuity, and the testatrix gave the residue of her estate to tenants in common. The testatrix died in February, 1913. In May, 1913, the defendants ascertained that it would be difficult to set aside a fund to answer the annuity without selling leasehold property which the residuary legatees were desirous of retaining. As the result of negotiations between the married woman and the residuary legatees, she agreed to disclaim the annuity in consideration of a lump sum to be paid her by them.

On an application by the married woman for a declaration that she was at liberty to refuse and disclaim the annuity:—

Held, that, having done nothing to accept the bequest of the annuity, she was entitled to refuse and disclaim it.

Dictum of Lindley M.R. in *Lady Bateman* v. *Faber* [1898] 1 Ch. 144, 149, explained and distinguished. *In re* WIMPERIS. WICKEN *v.* WILSON – – – **Warrington J. 502**

ILLEGITIMATE CHILDREN—Will—Construction—Gift to "children"—Belief of testatrix in their legitimacy—Exclusion – – – – – **254**
See WILL. 5.

IMPLICATION—Will—Construction—Supplying omission by implication—Gap in provisions—Capital of shares not disposed of—"Survivors or survivor" **694**
See WILL. 9.

IMPROVEMENT CHARGE—By whom to be borne—London County Council (Improvements) Act, 1899 – – **125**
See VENDOR AND PURCHASER. 3.

IMPROVEMENTS — Settled land — Authorized improvement — Necessary ancillary improvement—Conversion of land into building land—Estate office – **227**
See SETTLED LAND. 1.

INCOME—Capital or—Liquidation of guarantee society — Scheme of arrangement — Postponement of claims for principal—Interim partial payment of interest **203**
See SETTLED ESTATE.

INDEMNITY—Executors—No power to carry on business—Business carried on by executors—Executors' right to indemnity—Rights of creditors – – **604**
See ADMINISTRATION. 3.

—— Maintenance of suit—Common interest—Trade union—Slander on officer as such —Action by officer — Indemnity by union against costs—Ultra vires – **98**
See MAINTENANCE OF SUIT.

INFRINGEMENT—Patent.
See under PATENT.

INJUNCTION—Nuisance.
See under NUISANCE.

—— Restraint of trade.
See under RESTRAINT OF TRADE.

—— Way, Right of.
See under WAY, RIGHT OF.

INSOLVENT ESTATE — Executor—Preferment of creditors – – – – **742**
See ADMINISTRATION. 2.

INSURANCE—*Life, Fire, and Accident—Life Assurance Deposit—Claimants thereon—Mutual Rights—Life Policy Holders—Annuitant—Fire and Accident Policy Holders—Life Department Creditors—General Creditors—Breach of Contract by Life Department—Annuity granted in Compromise of Claim for Damages—Policy—Superannuation Allowance — Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 2, 3, 29, 30, 31, 32.

The statutory deposit forming part of the life assurance fund of a life, fire, and accident insurance company is by virtue of s. 3, sub-s. 2, of the Assurance Companies Act, 1909, a security for the life policy holders only. It is not a security for any other creditors of the life department, or for the policy holders of any other department such as fire or accident, but, subject to the claims of the life policy holders, it is general assets under s. 2, sub-s. 3.

Sect. 31, sub-s. (*d*), and s. 32, sub-s. (*c*), though exempting a company that has made the statutory deposit in respect of any class of assurance business, e.g., its life assurance business, from making a separate deposit in respect of its fire or accident insurance business under s. 2, sub-s. 4, and though enabling a fire or accident deposit to be transferred to the life department in the absence of a previous life assurance deposit, do not imply any charge on the life assurance deposit in favour of the fire or accident policy holders.

INSURANCE—*continued.*

Sect. 30, sub-s. (*b*), must be confined to annuities granted in the ordinary course of the company's business. An annuity granted by way of compromise of a claim for damages against the company for breach of contract by the life department is not an annuity within s. 30, sub-s. (*b*), and the annuitant is not a policy holder.

Semble, a superannuation allowance not payable out of the special fund referred to in s. 29 may be an annuity within the Act. *In re* BRITISH UNION AND NATIONAL INSURANCE COMPANY, LIMITED – – **Astbury J. 724**

INSURANCE (ACCIDENT) — Assurance Companies Act, 1909, ss. 2, 3, 29, 30, 31, 32
See INSURANCE. **724**

INSURANCE (FIRE) — Assurance Companies Act, 1909, ss. 2, 3, 29, 30, 31, 32 – **724**
See INSURANCE.

INSURANCE (LIFE) — Assurance Companies Act, 1909, ss. 2, 3, 29, 30, 31, 32 – **724**
See INSURANCE.

INSURANCE (MARINE) — Registered ship — Sunk in fairway of canal—Sale—Contract in print, altered in writing—How to be read—Transfer - – **453**
See SHIPPING.

INTEREST — Company—Debentures—Floating charge — Pari passu — Distribution of assets in debenture-holder's action – **41**
See COMPANY. 4.

—— Default in payment of — Company — Debenture—Conditions—Place fixed for payment of principal—Demand at place —Limit of borrowing power—Excess—Pleading – – – – – **920**
See COMPANY. 3.

—— Settled estate—Liquidation of guarantee society — Scheme of arrangement — Postponement of claims for principal —Interim partial payment of interest —Capital or income – – **203**
See SETTLED ESTATE.

—— Will—Residue—Legacy at twenty-three—Age attained in lifetime of testator—Interest, from what date payable **877**
See WILL. 14.

"**INTEREST IN EXPECTANCY**"—Covenant to settle after-acquired property – **115**
See SETTLEMENT. 1.

INTERFERENCE — Light — Effect of acquiescence in previous interference by other persons — Easement — Abandonment – – – – – **598**
See LIGHT.

INTERNATIONAL LAW—*Diplomatic Agent—Privilege—Waiver—Diplomatic Privileges Act,* 1708 (7 *Anne, c.* 12).

Company—Auditors—Duties—Legal Knowledge —Balance-Sheet—Ultra vires Payments.

Both under the common law and under the Diplomatic Privileges Act, 1708, a diplomatic

INTERNATIONAL LAW—*continued.*

agent accredited to the Crown by a foreign State is absolutely privileged from being sued in the English Courts and any writ issued against him is absolutely null and void.

This diplomatic privilege can be waived, if at all, only with full knowledge of the party's rights, and *semble* with the sanction of his Sovereign or (if he is of inferior rank to a minister plenipotentiary) his official superior.

Except in cases like *Taylor* v. *Best* (1854) 14 C. B. 487, where the agent is merely joined as a formal defendant, it is doubtful if any such waiver is possible.

Barbuit's Case (1737) Cas. t. Tal. 281; *Triquet* v. *Bath* (1764) 3 Burr. 1478; *Hopkins* v. *De Robeck* (1789) 3 T. R. 79; *Fisher* v. *Begrez* (1833) 2 Cr. & M. 240; *Taylor* v. *Best*, 14 C. B. 487; *Magdalena Steam Navigation Co.* v. *Martin* (1859) 2 E. & E. 94; *Musurus Bey* v. *Gadban* [1894] 1 Q. B. 533; 2 Q. B. 352; *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149; and *The Jassy* [1906] P. 270, discussed and explained.

Company auditors are bound to know or make themselves acquainted with their duties under the company's articles and under the Companies Acts for the time being in force, and if the audited balance-sheets do not shew the true financial condition of the company, and damage is thereby occasioned, the onus is on the auditors to shew that this damage is not the result of any breach of duty on their part.

Auditors are prima facie responsible for ultra vires payments made on the faith of their balance-sheet, but whether and to what extent they are responsible for not discovering and calling attention to the illegality of payments made prior to the audit must depend on the special circumstances of each case.

The payment of a commission for placing shares was authorized by the company's memorandum and a board resolution.

In reliance on the memorandum and resolution the auditors passed certain payments for commission in their balance-sheet without discovering and drawing attention to the fact that they were not authorized by Table A (1906), by which in default of articles the company was regulated:—

Held, in the special circumstances, that the auditors were not liable for this omission.

A solicitor who became a director three months after the incorporation of the company was subsequently paid certain sums for agreed costs of incorporation and other sums for costs, rent of office, and clerical assistance. These payments were confirmed as such by boards of which the solicitor was a member.

The auditors passed these payments in their balance-sheet without discovering, appreciating and drawing attention to the fact that as there was no power under Table A (1906) for a director to contract with the company, the solicitor could not charge profit costs, so that the payments to him were pro tanto unauthorized:—

Held, in the special circumstances, that the auditors were not liable.

INTERNATIONAL LAW—*continued.*

Principles stated in *Spackman* v. *Evans* (1868) L. R. 3 H. L. 171; *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887) 36 Ch. D. 787; *In re London and General Bank* (No. 2) [1895] 2 Ch. 673; *In re Kingston Cotton Mill Co.* (No. 2) [1896] 2 Ch. 279 (as to company auditors); and in *Thomas* v. *Devonport Corporation* [1900] 1 Q. B. 16 (as to public auditors), discussed and applied. *In re* REPUBLIC OF BOLIVIA EXPLORATION SYNDICATE, LIMITED – **Astbury J.** **139**

INTERROGATORIES.
See under DISCOVERY.

INTESTACY—Will—Construction—Gap in provisions—Capital of shares not disposed of—Supplying omission by implication —"Survivors or survivor" – – **694**
See WILL. 9.

INVESTMENTS—Trustees.
See under TRUSTEE.

—— Unauthorized — Will — Appropriation in specie—Settled shares – – **358**
See WILL. 6.

JEOPARDY—Trustee—Mortgage security—Interest duly paid—No suspicion of jeopardy —Mortgage properly retained—Appropriation of mortgage to settled share—Mortgage in fact worthless at date of appropriation—Liability of trustee **558**
See TRUSTEE. 3.

JOINT STOCK COMPANIES ACT, 1856, ss. 5, 61 – – – – – – **527**
See COMPANY. 15.

JUDICIAL TRUSTEES.
See under TRUSTEE.

JUDICIAL TRUSTEES ACT, 1896, s. 31.
See TRUSTEE. 1.

JURISDICTION—Company—Scheme of arrangement—Reconstruction – – **589**
See COMPANY. 2.

—— Company—Winding-up—Power to order examination in open Court—Discretion – – – – – **775**
See COMPANY. 16.

—— Foreign firm—Suing in firm's name—Service out of the jurisdiction – **748**
See PRACTICE. 2.

LANDING PLACE — Ferry — Franchise — Presumption of lost grant—Disturbance—Change of circumstances—New traffic—Highway—Pleasure traffic—Declaration of title – – – – – **822**
See FERRY.

LANDLORD AND TENANT—*Covenant—Not to underlet without consent—Consent not to be withheld in the Case of a Respectable and Responsible Person — Withholding Consent — Time—Underlease without Consent.*

A limited company demised a residential flat for a term of years, and the lessee cove-

LANDLORD AND TENANT—*continued.*

nanted not to assign or underlet the premises without the consent of the company, such consent not to be withheld in the case of a respectable and responsible person. On April 3, 1913, the lessee applied to the secretary of the company for leave to sub-let to H., a respectable and responsible person, and asked to know by April 14, as H. wanted possession on that day. The secretary forgot to communicate with his directors. On April 14 the lessee, not having received a reply, sub-let to H. and gave him possession. In an action by the company to recover possession for breach of the covenant:—

Held, that there had been no breach of the covenant, for that the consent of the company was a pure formality and had been withheld.

Held, also, that the period from April 3 to 14 was under the circumstances a reasonable time to wait for a reply. LEWIS & ALLENBY (1909), LIMITED *v.* PEGGE – **Neville J. 782**

2. —— *Demise of Room—Right to Outside Wall—Evidence.*

A demise in writing of the "rooms situate on the first and second floors" of business premises:—

Held, in the absence of context to the contrary, to include the external walls of the two floors.

Carlisle Café Co. v. *Muse Brothers & Co.* (1897) 67 L. J. (Ch.) 53; 77 L. T. 515, and dictum of Joyce J. in *Hope Brothers, Ld.* v. *Cowan* [1913] 2 Ch. 312, followed.

Held, also, that parol evidence that the external walls were to be excluded from the demise was not admissible.

Semble, in *Carlisle Café Co.* v. *Muse Brothers & Co.* Byrne J. determined that, in the absence of context to the contrary, the demise of a room includes the external walls of the room. GOLDFOOT *v.* WELCH – **Eve J. 213**

3. —— *Lease for Five Years—Construction—Proviso—Determination "after expiration of first three years"—Notice—Validity.*

By a lease dated February 21, 1911, certain premises were demised by the defendants to the plaintiffs for a term of five years from March 25, 1911, at a yearly rent of 225*l.* to be paid by equal quarterly payments on the usual quarter days. The lease contained a proviso that "after the expiration of the first three years of the term hereby granted, if the lessees shall desire to determine this lease, and shall give to the lessors six calendar months' previous notice in writing of such desire, such notice to determine on any quarter day, ... then and immediately on the expiration of such notice this present demise shall cease and be void."

On November 14, 1913, the plaintiffs gave notice in writing to the defendants that it was their intention to quit and deliver up possession of the premises on June 24, 1914. On a summons taken out by the plaintiffs to determine whether the notice was good:—

Held, that the case was indistinguishable from *Gardner* v. *Ingram* (1889) 61 L. T. 729, and the notice in question was invalid. The earliest day on which the lease could be terminated was September 29, 1914. *In re* LANCASHIRE AND YORKSHIRE BANK'S LEASE. W. DAVIS & SON *v.* LANCASHIRE AND YORKSHIRE BANK – – – – **Eve J. 522**

LANDLORD AND TENANT—*continued.*

LATENT AMBIGUITY—Will—Gift to husband and wife and "their daughter"—Five daughters—Extrinsic evidence – **375**
See WILL. 2.

LEASE — Company — Promoters — Sale of lease "agreed to be granted"—No binding agreement at time—Lease afterwards granted — Fiduciary position of promoters – – – – – **332**
See COMPANY. 10.

—— Executor—Devastavit—Statute of Limitations—Trustee Act, 1888 — Liability under covenants in lease – – **233**
See ADMINISTRATION. 1.

—— Landlord and tenant.
See under LANDLORD AND TENANT.

LEGACY.
See under WILL.

LEGACY DUTY—Will—Specific gift of foreign property free of legacy duty—"Legacy duty" — French mutation duty — Whether payable by specific legatee or executors – – – – – **847**
See WILL. 16.

LEX LOCI—Conflict of laws—Scottish instrument comprising Scottish and English land—Heirs-male of the body in fee—Estate in tail male in English land **511**
See CONFLICT OF LAWS.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIGHT—*Interference—Effect of Acquiescence in Previous Interference by other Persons—Easement—Abandonment.*

An abstraction of light coming over adjoining property, acquiesced in or consented to by the owner of the dominant tenement, does not entirely negative his right to an easement of light over other adjoining property, though it does not give him any further right over that second adjoining property so as to prevent the erection of a building which he could not have prevented had he not consented to the prior abstraction of light over the first adjoining property.

Staight v. *Burn* (1869) L. R. 5 Ch. 163, and *Ankerson* v. *Connelly* [1907] 1 Ch. 678, followed and applied.

Garritt v. *Sharp* (1835) 3 Ad. & E. 325, and *Blanchard* v. *Bridges* (1835) 4 Ad. & E. 176, distinguished. W. H. BAILEY & SON, LIMITED *v.* HOLBORN AND FRASCATI, LIMITED **Sargant J. 598**

LIGHT RAILWAYS.
See under RAILWAY.

LIMITATION — Settlement — Real property — Limitation to widow of bachelor for life with remainder to issue—Definition of rule restraining limitations to unborn issue – – – – – – **595**
See SETTLEMENT. 3.

LIMITATIONS, STATUTE OF—Creditor's action—Common account—Liability under covenants in lease—Executors of lessee's deceased executor—Devastavit—Trustee Act, 1888 – – – – – 233
See ADMINISTRATION. 1.

—— Lunatic — Solicitor appointed by quasi-committee—Costs—Delay in payment—Personal liability of quasi-committee—Application by solicitor – – 927
See LUNACY. 1.

—— Mines and minerals—Title—Lease—Conveyance of reversion—Severance—Rent—Apportionment – – – 438
See DEED.

—— Trustee — Breach of trust — Relief from liability – – – – – 1
See TRUSTEE. 1.

LOCAL GOVERNMENT—*Private Street Works—Notice to make up Road—Service on Owner of several Houses in same Road—Non-compliance with Notice—Execution of Works by Local Authority—Apportionment of Expenses—Non-payment by Owner of Apportioned Sum—Charge on Premises—Charge, whether for whole Sum on all Premises of Owner, or for Apportioned Part in respect of each of Premises—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 257.

A local authority under the powers vested in them by s. 150 of the Public Health Act, 1875, served upon the owner of certain houses and plots of building land, fronting on two roads within their district, notices to make up the two roads opposite his premises. The owner did not comply with the notices and the local authority executed the works themselves and subsequently sent in a demand to him for an apportioned part of the expenses incurred by them. The owner did not pay, and thereupon the local authority issued a summons against him claiming (inter alia) a declaration that they were entitled under s. 257 of the Act to a charge for the full amount due on all the premises of the owner in the two roads:—

Held, that under s. 257 the local authority were only entitled to a charge for an apportioned sum in respect of each of the premises fronting on the road in respect of which the apportioned expenses were incurred. CROYDON RURAL DISTRICT COUNCIL *v.* BETTS
Warrington J. 870

—— Gas.
See under GAS.

LONDON—Improvement charge—By whom to be borne — London County Council (Improvements) Act, 1899 – – 125
See VENDOR AND PURCHASER. 3.

LONDON COUNTY COUNCIL (IMPROVEMENTS) ACT, 1899, s. 61 – – 125
See VENDOR AND PURCHASER. 3.

LUNACY—*Lunatic not so found by Inquisition—Receiver—Quasi-Committee—Solicitor appointed by Quasi-Committee—Costs—Delay in Payment — Personal Liability of Quasi-Committee — Statute of Limitations—Application by Solicitor—Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 116, *sub-s.* 2; *s.* 120.

Solicitors appointed by the quasi-committee of a lunatic not so found by inquisition did work in respect of the lunatic's real estate, the costs of which were not paid to them inasmuch as all the lunatic's income was applied for her benefit and there were no funds available. Some of these costs were, as against the quasi-committee, barred by lapse of time:—

Held, that the quasi-committee was the statutory agent of the lunatic and was not personally liable to the solicitors appointed by him to act for the lunatic; the costs of the solicitors were payable out of the estate of the lunatic; the relation of solicitor and client did not exist between the solicitors and the quasi-committee, therefore the question of the Statute of Limitations could not be raised by him; and, if it might be raised by the judge, that in the present case it ought not to be pleaded. *In re* E. G., A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUISITION
C. A. 927

2. —— *Real Estate—Estate Tail—Lunatic—Committee—Power to bar Lunatic's Estate Tail—Resettlement — Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *ss.* 108, 111, 120 (*a*), (*l*)—*Lunacy Act*, 1891 (54 *&* 55 *Vict. c.* 65), *s.* 27—*Fines and Recoveries Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 74), *s.* 15.

The estate tail of a lunatic cannot be sold under s. 120 (*a*) of the Lunacy Act, 1890; but a lunatic's power to bar the entail is a power vested in him for his own benefit within s. 120 (*l*), and the judge, or the Master under s. 27 of the Lunacy Act, 1891, has jurisdiction in lunacy to authorize the committee to sell the property so as to bar the entail. Under ordinary circumstances the proceeds of sale should be resettled by the judge under his general jurisdiction so as not to prejudice the remaindermen.

Form of order of Lindley L.J. in *In re Noyes* ((unreported), see report [1914] 1 Ch. 618, at p. 629, note) followed. *In re* E. D. S., A PERSON OF UNSOUND MIND SO FOUND BY INQUISITION – – – – – **C. A. 618**

Note.—See also a report of *In re Noyes* (June 23, 1891) as a note at p. 629 of the above case.

MAIN—Gas—"Main" or "service pipe" – 270
See GAS.

MAINTENANCE OF SUIT—*Common Interest—Trade Union — Slander on Officer as such — Action by Officer—Indemnity by Union against Costs—Ultra vires.*

A trade union has no legal common interest in a slander action brought by one of its officers, although that officer is slandered by way of his office as well as personally and the union is thereby adversely affected.

Payment of the officer's costs out of the funds of the union in pursuance of an indemnity given by the union before action is therefore obnoxious to the law of maintenance and ultra vires.

MAINTENANCE OF SUIT—*continued.*

Alabaster v. *Harness* [1895] 1 Q. B. 339 followed.

Decision of Swinfen Eady J. [1913] 1 Ch. 259 affirmed. ORAM *v.* HUTT – – **C. A. 98**

MARGINAL NOTES—to Act of Parliament *See* CORPORATION. **300**

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARRIED WOMEN'S PROPERTY ACT, 1882, s. 1 – – – – – – **502**
See HUSBAND AND WIFE.

MEETINGS —Company—Directors—Retirement at ordinary meeting—Failure to hold meeting—Remuneration – – **883**
See COMPANY. 9.

—— Company—Informal meeting—Additional directors — Appointment by board of directors—Unable or unwilling to act—Power of company in general meeting
See COMPANY. 8. **895**

MEMORANDUM AND ARTICLES OF ASSOCIATION—Company.
See under COMPANY.

MERCHANT SHIPPING.
See under SHIPPING.

MICROSCOPIST—in pathological laboratory—Contract of service—Reasonable restriction – – – – – – **468**
See RESTRAINT OF TRADE. 1.

MINES—Deed—Construction—Mines and minerals — Title — Lease — Conveyance of reversion— Severance — Rent — Apportionment—Statute of Limitations **438**
See DEED.

—— Tenant for life and remainderman—Will directing sale of real estate—Power to postpone—Rents and royalties under mining leases—Open mines – **910**
See WILL. 12.

MISREPRESENTATION —Company — Prospectus – – – – – – **542**
See COMPANY. 11.

MORTGAGE—*Redemption—Mortgage of Land—Transfer of Stock as Collateral Security—Fraudulent Pledge of Stock by Mortgagee to Bank—Sub-mortgage of Land to Bank without Notice of Fraud—Mortgagor's right to redeem as against Bank.*

The plaintiff mortgaged land to his solicitor to secure an advance of 4000*l.*, and by way of collateral security transferred to him a sum of 3000*l.* debenture stock. The solicitor then fraudulently induced the plaintiff to execute a memorandum giving a security on the stock in favour of the defendant bank not merely for the 4000*l.* but for all advances by the bank to the solicitor, and the stock was transferred into the names of trustees for the bank who had no notice of the fraud. The solicitor afterwards sub-mortgaged the land to the bank by way of equitable deposit to secure his general indebtedness to them. The bank then obtained from the solicitor a written memorandum of deposit of which they gave notice to the plaintiff, and afterwards took a legal transfer of the mortgage. The solicitor then became bankrupt, owing the bank a sum far exceeding 4000*l.*

In a redemption action against the bank the plaintiff sought to redeem the mortgage on payment of 1000*l.*, being the amount of the mortgage debt less the value of the collateral security. The bank contended that he could only redeem on payment of the full 4000*l.* :—

Held, affirming the decision of Warrington J., that the bank, being ignorant of the solicitor's fraud, were entitled as against the plaintiff to apply the stock towards the general indebtedness of the solicitor ; but as regarded the mortgage of the land they were in no better position than their assignor, who could not have resisted the plaintiff's right to redeem on payment of 4000*l.* less the value of the stock. DE LISLE *v.* UNION BANK OF SCOTLAND – – – – – – **C. A. 22**

—— Company—Debentures—Floating charge—Reservation of power to company to "mortgage" or deal with its property—Subsequent floating charge—Priority
See COMPANY. 5. **800**

—— Trustee—Mortgage security—Interest duly paid—No suspicion of jeopardy—Mortgage properly retained—Distribution of estate in specie—Appropriation of mortgage to settled share—Liability of trustee – – – – – **558**
See TRUSTEE. 3.

—— Will—General charge of debts (including mortgage debts) — Specific devises — Exoneration—Real Estate Charges Acts
See WILL. 7. **278**

NEPHEWS—Will—Gift to nephews—Exclusion of nephews of husband of testatrix **134**
See WILL. 13.

NOTICE—Landlord and tenant—Lease for five years—Construction— Proviso — Determination "after expiration of first three years"—Validity of notice – – **522**
See LANDLORD AND TENANT. 3.

—— Local government—Private street works—Notice to make up road—Service on owner of several houses in same road—Non-compliance with notice—Execution of works by local authority—Apportionment of expenses—Non-payment by owner of apportioned sum—Charge on premises – – – – – **870**
See LOCAL GOVERNMENT.

NUISANCE—*Highway—Obstruction of Highway—Theatre—Collection of Crowds before Opening of Doors—Access to Adjacent Premises—Injunction—Regulation by Police.*

In consequence of a popular performance daily, at 2.30 P.M. and 6.20 P.M., at the defendants' theatre of varieties, the access to the plaintiffs' adjacent premises was obstructed during important periods of the day by reason of the assembling of a crowd and the formation of a queue, at times five deep, on the kerb or in the gutter in front of the plaintiffs' premises previously to the opening of the doors of the theatre :—

Held by the Court of Appeal (Cozens-Hardy M.R. and Swinfen Eady L.J., Phillimore L.J. dissenting), that in the circumstances the obstruction was an actionable nuisance and the defendants were liable to be restrained by injunction, and that the failure of the police to prevent the obstruction by regulating the crowd and keeping proper gaps for the passage of the public through the queue did not afford a good defence.

Decision of Joyce J. affirmed.

Barber v. *Penley* [1893] 2 Ch. 447 approved.

Per Phillimore L.J. (dissenting) : Every trader has a right to make his shop as attractive as possible and is not responsible because crowds stop to gaze at it. A fortiori, the defendants, whose attraction was in the future, were not responsible because crowds collected before the hour at which they were invited and caused an obstruction which it was the duty of the police to prevent. The evidence in the present case shewed that the queue was nearly as inoffensive as a queue could be, and to say that in such circumstances a queue was an actionable nuisance was a very mischievous proposition and one very much calculated to interfere with trade and business. LYONS, SONS & CO. *v.* GULLIVER **C. A. 631**

NURSE—Will—Legacy—"Domestic servant"—Meaning of "domestic"—Male nurse—Temporary suspension of service **682**
See WILL. 8.

OBSTRUCTION—Highway.
See under HIGHWAY.

—— Light.
See under LIGHT.

—— Way, Right of.
See under WAY, RIGHT OF.

ORIGINATING SUMMONS — Interference by Court on—Trustee and cestuis que trust—Inquiry as to continuing investments—Discretion of trustees – – **890**
See TRUSTEE. 2.

PARCELS—Conveyance—Plan—Falsa demonstratio – – – – – – **68**
See VENDOR AND PURCHASER. 1.

PAROL EVIDENCE.
See under EVIDENCE.

PART PERFORMANCE—Sale of land—Statute of Frauds – – – – – **788**
See CONTRACT.

PATENT — Discovery — Interrogatories — Infringement—Names of manufacturers of infringing articles—Principles on which interrogatories allowed – **699**
See DISCOVERY.

PATHOLOGICAL LABORATORY—Microscopist in—Contract of service—Reasonable restriction – – – – **468**
See RESTRAINT OF TRADE. 1.

PAYMENT—Company—Debenture—Floating security—Covenant for payment on specified day—Winding up of company before such day – – – **954**
See COMPANY. 6.

PAYMENT INTO COURT—Practice.
See under PRACTICE.

PER CAPITA—Will—Bequest to unmarried daughters of A. and B.—Bequest to B. personally—Division per capita – **70**
See WILL. 3.

PERFORMANCE—Sale of land—Part performance—Statute of Frauds – – **788**
See CONTRACT.

PLAN — Conveyance — Parcels — Falsa demonstratio – – – – – – **68**
See VENDOR AND PURCHASER. 1.

PLEADING—Company—Debenture—Conditions—Place fixed for payment of principal—Default in payment of interest—Demand at place—Limit of borrowing power—Excess – – – **920**
See COMPANY. 3.

PLEDGE—Mortgage—Redemption—Transfer of stock as collateral security—Fraudulent pledge of stock by mortgagee to bank—Mortgagor's right to redeem as against bank – – – – – **22**
See MORTGAGE.

POLICE—Theatre — Obstruction of highway—Collection of crowds before opening of doors—Access to adjacent premises—Injunction—Regulation by police **631**
See NUISANCE.

POLICY—Insurance.
See under INSURANCE.

POSTPONEMENT — Conversion, Trust for — Power to postpone — Hotchpot — Difficulty of realizing estate – – **358**
See WILL. 6.

—— Mines—Will directing sale of real estate—Power to postpone—Rents and royalties under mining leases—Open mines **910**
See WILL. 12.

—— Will—Residue—Trust for sale and conversion—Power to postpone—Shares in limited company – – – **192**
See WILL. 15.

POSTPONEMENT—*continued.*

—— Will—Trust for sale—Power to postpone—Settlement of residuary estate—Share vested in possession—Right of beneficiary to insist on immediate sale 62
See WILL. 17.

POWER OF ANTICIPATION—Married woman.
See under HUSBAND AND WIFE.

POWER OF APPOINTMENT—Settled land—Title—Sale—Compound settlement—Trustees for the purposes of the Settled Land Acts – – – – 110
See SETTLEMENT. 4.

POWER OF ATTORNEY—Validity—Proxy—Appointment by corporation—Common seal—Foreign company having no seal
See COMPANY. 13. 332

PRACTICE—*Admissions "either on the pleadings or otherwise"—Admissions by letter—Rules of the Supreme Court*, 1883, *Order XXXII., rr.* 1, 4, 6.

The words "or otherwise" in r. 6 of Order XXXII. are not confined to admissions made under r. 1 or r. 4 of the same Order, but are of general application, and justify the making or giving of an immediate order or judgment, when an admission is made by letter of facts which shew that the defendant has no defence to the action. ELLIS *v.* ALLEN
Sargant J. 904

2. —— *Foreign Firm—Suing in Firm's Name—Service out of the Jurisdiction—Rules of the Supreme Court, Order XLVIIIA, r.* 1.

A writ was issued by the plaintiff, who was a foreigner carrying on business in England, against E. R., a foreigner carrying on business in England, and Mayer Frères & Co., a French firm carrying on business in Paris, consisting of three partners all domiciled in Paris, and having no place of business in England, who were sued in the firm name. The writ asked for cancellation of an agreement, and was served upon E. R. in England. Liberty to issue a concurrent writ and serve notice of it out of the jurisdiction on Mayer Frères & Co. was granted, and they were duly served in Paris at the principal place of business of the firm:—

Held (affirming the decision of Astbury J.), that the proceedings must be set aside, so far as they affected Mayer Frères & Co., on the ground that there was no power to sue a foreign partnership, not carrying on business in England, under its firm name, in the absence of evidence that by French law a partnership was a different legal entity from the individual partners. VON HELLFELD *v.* E. RECHNITZER AND MAYER FRÈRES & CO.
C. A. 748

3. —— *Striking out pleadings—Action by Lunatic not so found—Lunacy not admitted by Defence—Relevant issue at trial—Authority of Solicitors of Plaintiff to bring Action—Striking out so much of Defence as did not admit Lunacy—Costs—Rules of the Supreme Court*, 1883, *Order XXV., r.* 4.

In an action brought by a plaintiff described as "of unsound mind not so found" by her next friend against a firm of solicitors for delivery up of certain deeds and documents of title which had been deposited with them by the plaintiff as her solicitors, the statement of claim alleged that the plaintiff was and had for many years past been a person of unsound mind not so found. The defendants by their defence stated that they did not admit that, either at the time when the deeds and documents came into their possession or at any time since, the plaintiff was, or that she now was, a person of unsound mind; that they held the deeds and documents for her; and that she alleged that she was during the period in question, and still was, of full mental capacity and soundness of mind.

On an application by the plaintiff to strike out so much of the defence as did not admit the unsoundness of mind of the plaintiff and for judgment on the admissions in the defence:—

Held, that the defendants by raising the issue as to the unsoundness of mind of the plaintiff were in effect denying the authority of the plaintiff's solicitors to bring the action, and that that was not an issue which it was competent to them to raise at the trial.

Held, therefore, that so much of the defence as did not admit the unsoundness of mind of the plaintiff must be treated as irrelevant, and that the plaintiff was entitled to an order for delivery up of the deeds and documents on the admissions in the defence. RICHMOND *v.* BRANSON & SON – – **Warrington J. 968**

—— Costs.
See under COSTS.

—— Discovery.
See under DISCOVERY.

—— Interrogatories.
See under DISCOVERY.

—— Originating summons.
See under ORIGINATING SUMMONS.

—— Payment into Court with denial of liability—Costs—Way, Right of – – 704
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PREFERENCE—Company—Scheme of arrangement—Alteration of preferential rights
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—— Company—Winding-up—Surplus assets—Preference shares—Dividend at stated percentage – – – – 755
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PRESUMPTION—Lost grant—Ferry—Franchise—Disturbance—Change of circumstances—Traffic—Landing place—Highway—Pleasure traffic—Declaration of title – – – – – 822
See FERRY.

PRIORITY—Company—Debentures—Floating charge—Subsequent floating charge 800
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PRIORITY—*continued.*

—— Executors—Assets of testator—No power to carry on business—Business carried on by executors—Executors' right to indemnity—Rights of creditors - 604
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—— Fixtures — Hire-purchase agreement — Debentures — Receiver — Possession — Right of vendor of fixtures to remove
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PRIVATE STREET WORKS — Local government—Notice to make up road—Service on owner of several houses in same road—Non-compliance with notice—Execution of works by local authority—Apportionment of expenses — Nonpayment by owner of apportioned sum—Charge on premises - - 870
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PRIVILEGE — Diplomatic agent — Waiver — Diplomatic Privileges Act, 1708 - 139
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PROMOTERS — Sale of lease "agreed to be granted" — No binding agreement at time — Lease afterwards granted — Fiduciary position of promoters - 332
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PROSPECTUS — Company — Expert's report — Bona fide report—Statements expressly based thereon — Contract to take shares — Basis of contract — Material inaccuracy in report and statements—Rescission - - - - - 542
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—— Company—Statement in lieu of prospectus — Misstatements and omissions — Allotment of shares—Void or voidable—Statutory requirements - - 390
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PROXY—Appointment by corporation — Common seal—Foreign company having no seal—Power of attorney—Validity 382
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PUBLIC HEALTH—Streets.
See under Streets.

PUBLIC TRUSTEE—Custodian trustee - 83
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PUBLIC TRUSTEE ACT, 1906, ss. 2, 4 - 83
See Charity. 2.

PUBLIC TRUSTEE RULES, 1912, r. 30 - 83
See Charity. 2.

PURCHASER—Vendor and.
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RAILWAY—Light railway company—Meaning of "share capital"—Directors—Casual vacancy — Irregularity in allotting shares - - - - - - 568
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REAL ESTATE CHARGES ACT, 1854, s. 1 278
See Will. 7.

REAL ESTATE CHARGES ACT, 1867, s. 1 278
See Will. 7.

REAL PROPERTY—Settlement—Limitation to widow of bachelor for life with remainder to issue—Definition of rule restraining limitations to unborn issue
See Settlement. 3. 595

REAL PROPERTY LIMITATION ACT, 1833, s. 9
See Deed. 438

REASONABLENESS—Restraint of trade.
See under Restraint of Trade.

RECEIVER—Appointment of—Company—Debenture—Floating security—Covenant for payment on specified day—Winding up of company before such day—Debenture-holders' action - - - 954
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RESTRAINT OF TRADE—*Contract of Service—Microscopist in Pathological Laboratory—Agreement not to engage in Similar Work within Ten Miles—Restriction lasting for Life—Agreement for Service terminable at a Month's Notice—Construction—Reasonable Restriction.*

The plaintiff in this action carried on the business of a pathological laboratory. He had commenced the business in 1901. It consisted of making chemical, microscopical, and bacteriological examinations of samples of material sent to him and making reports thereon. It was in 1901 a new method of medical research; there were only two or three similar institutions in London, and the plaintiff's clients were almost wholly consultant physicians residing in the Harley Street district. In 1905 the plaintiff engaged the defendant as assistant microscopist in his laboratory upon terms which made the engagement terminable on a month's notice, and included an agreement that the defendant would not engage in any similar work within ten miles of the plaintiff's laboratory; no limit of time was expressed. The period of notice was afterwards lengthened. The plaintiff gave the defendant six months' notice on July 15, 1912, but by consent the engagement was determined on October 25. The defendant shortly afterwards opened a pathological laboratory at 25, Beaumont Street, within half a mile of the plaintiff's laboratory. The plaintiff brought this action to restrain him. Sargant J. held on the construction of the agreement that the restriction was confined to the time during which the engagement continued, and dismissed the action:—

Held by the Court of Appeal (Cozens-Hardy M.R., Swinfen Eady and Phillimore L.JJ.), on the construction, that the restriction lasted during the whole of the defendant's life.

Held by Cozens-Hardy M.R. and Phillimore L.J., Swinfen Eady L.J. dissenting, that the restriction was wider than was reasonably necessary for the plaintiff's protection and was therefore void.

Decision of Sargant J. affirmed, but on different grounds. EASTES *v.* RUSS - **C. A. 468**

RESTRAINT OF TRADE—*continued.*

2. —— *Meat Importers — Other Business similar to that of Employer—Severance of Covenant—Reasonableness—Nature of Business—Area of Restraint—Time Limit of One Year—Injunction.*

In 1908 the plaintiff company agreed to employ the defendant F. as manager of the company at Liverpool for five years from January, 1909, and by clause 7 it was provided that the manager should not for a period of one year after the determination of the agreement, whether by effluxion of time or in any other way whatsoever, either solely or jointly with or as agent for any other person, firm or company, directly or indirectly carry on or be engaged, concerned, or interested in carrying on within the United Kingdom the trade or business of an importer of meat or an agent for importers of meat, or any other trade or business similar to any trade or business carried on during the period of his employment by the company (except with the consent in writing of the directors for the time being).

At the date of the agreement the plaintiff company's business as importers or agents for importers was confined to the Australasian trade as distinguished from the American trade, though they did some business as wholesale dealers in meat, including American meat. The business was conducted almost entirely in the north of England and the Midlands, but it had since undergone considerable expansion. In proceedings to enforce clause 7 of the agreement it was admitted that the concluding part of the clause was too wide, but it was contended that the clause was severable and that the first part was not too wide and was enforceable by injunction:—

Held, that clause 7 of the agreement was severable, but that the restraint against carrying on within the United Kingdom the business of a meat importer or agent for meat importers was wider than was reasonably required for the protection of the plaintiff company: (1.) because it embraced the American trade as well as the Australasian trade and could not be fairly construed as referring to the latter trade alone, and (2.) because it extended to the whole of the United Kingdom, and that the clause was therefore void as being in undue restraint of trade notwithstanding the time limit of one year.

To preclude a former servant from carrying on his natural business in any part whatever of the United Kingdom is a very strong step and requires exceptional justification.

Ward v. *Byrne* (1839) 5 M. & W. 548 followed.

Observations of Lord Moulton on the severability of covenants in restraint of trade in *Mason* v. *Provident Clothing and Supply Co.* [1913] A. C. 724, at p. 745, considered. S. V. NEVANAS & Co. *v.* WALKER AND FOREMAN **Sargant J. 413**

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SERVICE—Foreign firm—Suing in firm's name—Service out of the jurisdiction – 748
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SERVICE, CONTRACT OF—Restraint of trade.
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SETTLED ESTATE — *Tenant for Life and Remainderman — Apportionment — Settlement comprising Guaranteed Debentures—Default in Payment of Principal and Interest—Liquidation of Guarantee Society—Scheme of Arrangement — Postponement of Claims for Principal — Interim Partial Payment of Interest—Capital or Income.*

A testator gave his residuary personal estate upon trust for his two sons for life with remainder to their respective children or issue, and empowered his trustees to retain any securities upon which any portion of his estate might be invested. He further declared that the income, whether the retained investments were authorized or not, and whether of a permanent or wasting character, should be applied "as if the same were income arising from the proceeds of conversion, no part thereof being liable to be retained as capital." Part of the estate consisted of debentures of a company guaranteed by the Law Guarantee Society, Limited. Default had been made

SETTLED ESTATE—*continued.*
in payment of principal and interest of the debentures. In the winding up, under supervision of the Court, of the guarantee society a scheme of arrangement was sanctioned under which the time for payment of claims of creditors was postponed till December 31, 1918, and it was further provided that "in all cases of default in payment in full of interest on the debentures of any company down to" December 31, 1918, the liquidators of the society should pay or make up such interest to 3 per cent. per annum on the principal moneys secured by the debentures:—

Held, that the moneys received or to be received by the trustees of the will in respect of payments of interest at 3 per cent. under the scheme ought to be applied as income payable to the tenants for life, and not subject to apportionment.

Decision of Joyce J. reversed. *In re* PENNINGTON. PENNINGTON *v.* PENNINGTON **C. A. 203**

—— Settled land.
See under SETTLED LAND.

SETTLED LAND — *Improvements — Authorized Improvement—Necessary ancillary Improvement—Conversion of Land into Building Land—Estate Office—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 25.

The building of an estate office on settled land, though not an improvement per se within the improvement clauses of the Settled Land Act, 1882, s. 25, may in a proper case be allowed under the general words of the section as an "operation incident to, or necessary, or proper . . . for securing the full benefit of" an authorized improvement, e.g., the conversion of land into building land under clauses 17 and 18.

In re Lord Gerard's Settled Estate [1893] 3 Ch. 252 distinguished. *In re* DE CRESPIGNY'S SETTLED ESTATES – – **Astbury J. 227**

2. —— *Tenant for Life—Person having the Powers of a Tenant for Life—Trustees of Fee Simple—Trust to accumulate Rents for Twenty-one Years—"Upon the expiration of the said period" upon Trust for Daughter for Life—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 58, *sub-s.* 1, *cl.* (*vi.*)—*Accumulations Act*, 1892 (55 *&* 56 *Vict. c.* 58), *s.* 1.

A testator by his will devised his capital mansion house and the whole of his real estates to his trustees in fee simple, upon trust to permit his daughter during her life to have the personal use or occupation of the mansion house free from rent, rates and taxes, and any liability for repair and upkeep, and he directed his trustees to stand possessed of all his hereditaments and premises (subject to the trust in favour of his daughter) upon trust to let and manage the same for twenty-one years after his death, and, after the payment of all outgoings, to accumulate the balance of the rents and profits, and apply them as therein mentioned, and upon the expiration of the period of twenty-one years, and subject to the trusts of the mansion house in favour of his daughter, the testator directed that the whole of the devised hereditaments should be held upon trust for his eldest daughter for life, with remainder to her first-born son for life, with remainders over. Upon the death of the testator in 1912 questions arose, inter alia, as to the position of the daughter under the will. It was not disputed that she was tenant for life of the mansion house, but it was objected that she had not the powers of a tenant for life of the rest of the real estate:—

Held, following the decision in *In re Llewellyn* [1911] 1 Ch. 451, that the daughter had the powers of a tenant for life in respect of the testator's residuary estate under the Settled Land Act, 1882, s. 58, sub-s. 1, cl. (vi.).

In re Martyn (1900) 69 L. J. Ch. 733 observed upon. *In re* BEAUCHAMP'S WILL TRUSTS. CADGE *v.* BARKER-HAHLO **Eve J. 676**

—— Costs of proceedings proposed to be taken for the recovery of land—Benefit to estate—Proceedings abandoned—Costs paid by tenant for life—Right to be recouped out of capital – – **77**
See SETTLEMENT. 2.

—— Power of appointment — Title — Sale — Compound settlement– – – **110**
See SETTLEMENT. 4.

—— Settled estate.
See under SETTLED ESTATE.

SETTLEMENT — *After-acquired Property, Covenant to settle—"Interest in expectancy"—Marriage Settlement.*

A testatrix by her will, dated in 1862, gave a fifth share of her residuary estate to her daughter W. for life, with remainder to her children, but if she should die without issue (which event happened) "her share to go to her next of kin as if she had not been married." In 1866 J., another daughter of the testatrix, married, and by her marriage settlement covenanted that any real or personal property to which she then was entitled for any estate or interest whatsoever in reversion, remainder, or expectancy should be settled upon the trusts of the settlement. W. died in 1912 without issue, and leaving J. her sole next of kin:—

Held, that the interest which J. had at the date of the settlement in the settled share of W. was either a mere spes successionis, or, having regard to the authorities, including *In re Parsons* (1890) 45 Ch. D. 51, must be treated as such, and therefore was not assignable at law.

Held, further, that inasmuch as the covenant did not relate to any defined spes successionis it was too vague to be enforceable in equity; and that consequently the property to which J. became entitled as next of kin of her sister was not comprised in the settlement.

Decision of Neville J. [1913] 2 Ch. 92 reversed. *In re* MUDGE – – – **C. A. 115**

SETTLEMENT—*continued.*

2. —— *Costs of Proceedings proposed to be taken for the Recovery of Land—Benefit to Estate—Proceedings abandoned—Costs paid by Tenant for Life—Right to be recouped out of Capital—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 36.

The Court has jurisdiction under s. 36 of the Settled Land Act, 1882, to approve of proceedings once proposed to be taken for the recovery of land alleged to be subject to a settlement and to direct the costs to be reimbursed out of capital notwithstanding that at the date of the application the proceedings have been abandoned and the costs paid by the tenant for life. *In re* WILKIE'S SETTLEMENT. WADE *v.* WILKIE **Sargant J. 77**

3. —— *Real Property—Limitation to Widow of Bachelor for Life with Remainder to Issue—Definition of Rule restraining Limitations to Unborn Issue.*

Limitation of freehold to issue of bachelor in remainder after life estate to widow :—

Held, void, as infringing "the rule against limiting land to an unborn child for life with remainder to his unborn child."

Whitting v. *Whitting* (1908) 53 Sol. J. 100, and dictum of Kay J. in *In re Frost* (1889) 43 Ch. D. 246, followed.

The rule should be expressed as above, and not as "the rule against double possibilities," following Farwell L.J. in *In re Nash* [1910] 1 Ch. 1, 9, 10. *In re* PARK'S SETTLEMENT. FORAN *v.* BRUCE – – – **Eve J. 595**

4. —— *Settled Land—Power of Appointment—Title—Sale—Compound Settlement—Trustees for the Purposes of the Settled Land Acts—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 5, 8 ; *s.* 38.

By his will dated in 1891 the testator appointed trustees, and empowered his wife by deed, will, or codicil to appoint as she might think fit all or any part of his property, and in default he gave all his freehold estates to the use of his wife for life, with remainder to the use of W. P. G. for life, with divers remainders over ; and the testator empowered his trustees to sell any part of his freehold estates thereinbefore given. The testator died in 1891, and by her will his widow appointed W. P. G. her sole executor, and in exercise of her power of appointment appointed the real estate devised by her husband's will to the use of W. P. G. for life, with remainder to the use of his first and every other son successively in tail male, with remainders over. The testatrix died in 1892. In 1912 W. P. G., in exercise of his powers as tenant for life in possession, contracted to sell part of the settled estate. The purchaser objected that, there being no trustees for the purposes of the Settled Land Acts, the vendor could not make a good title :—

Held, that, the general power of appointment having been fully exercised by the widow, there was a resettlement of the estate, and there being no existing interests or charges having priority over that resettlement, the original settlement created by the testator's will was at an end, and consequently there were no trustees having a power of sale, and trustees for the purposes of the Settled Land Acts of the widow's will must be appointed.

Decision of Eve J. [1913] 1 Ch. 561 reversed. *In re* GORDON AND ADAMS' CONTRACT. *In re* PRITCHARD'S SETTLED ESTATE **C. A. 110**

SEVERANCE—Deed—Construction—Mines and minerals—Title—Lease—Conveyance of reversion — Rent — Apportionment — Statute of Limitations – – **438**
See DEED.

—— Restraint of trade—Severance of covenant—Reasonableness – – – **413**
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SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SHARES—Company.
See under COMPANY.

SHIPPING—*Registered Ship—Sunk in Fairway of Canal—Sale—Contract in print, altered in writing—How to be read—Transfer—" Constructive Loss " — Closing of Register — Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 21, *sub-s.* 1 ; *ss.* 24, 530 (*a*), (*c*)—*Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 60—*Merchant Shipping Act,* 1906 (6 *Edw.* 7, *c.* 48), *s.* 52, *sub-s.* 1.

A contract of sale of a registered ship contained, in print, a clause that "on completion of the purchase the seller will deliver to the purchaser a legal bill of sale of the vessel" with the words "legal bill of sale of" struck out but legible and the words "delivery order for" substituted in writing for them :—

Held, that the document must be read as written out afresh with the struck out words omitted and the substituted words inserted, and that the express term that the seller would deliver a delivery order for the vessel did not relieve him from the implied obligation to transfer the ship by bill of sale in accordance with s. 24 of the Merchant Shipping Act, 1894.

Semble, a ship may be a "constructive total loss" within the meaning of s. 60 of the Marine Insurance Act, 1906, without being "actually or constructively lost" within the meaning of s. 21 of the Merchant Shipping Act, 1894.

The power of sale given by s. 530 of the Merchant Shipping Act, 1894, carries with it, when exercised in relation to a registered ship, a power to transfer by statutory bill of sale, free and discharged from incumbrances.

On May 1, at a sale by auction by the Manchester Ship Canal Company, exercising their powers under s. 530 of the Merchant Shipping Act, 1894, a registered ship, which they had raised and removed to the pontoon at Manchester after she had been sunk in the fairway on March 22, was knocked down to the defendant, who paid a deposit and signed a contract containing a clause that on com-

SHIPPING —*continued.*
pletion of the purchase the company would deliver to him a delivery order for the vessel. No steps had then been taken to close the register. On May 8, the day fixed for completion, the purchaser attended with the balance of the purchase-money, but as he insisted that he was entitled to have the ship transferred to him by bill of sale and the company insisted that he was bound to complete on receiving a delivery order only, he refused to complete. On May 22 the company offered to execute a bill of sale, which the purchaser refused, the register having in the meantime been closed at the instigation of the company. The company brought an action for the balance of the purchase-money :—

Held, that it was an implied term of the contract that the ship should be transferred by bill of sale, and that the implied term was not negatived by the express term for a delivery order ; that, whether or not the ship being a constructive loss on March 22 for insurance purposes was constructively lost within the meaning of s. 21 of the Merchant Shipping Act, 1894, the power of sale contained in s. 530 carried with it a power to transfer, free from incumbrances ; that the company, having been in the wrong up to May 22, did not put themselves in the right by then offering a bill of sale ; and that the action failed. MANCHESTER SHIP CANAL COMPANY *v.* HORLOCK – – – – – **Eve J. 453**

SLANDER — Maintenance of suit — Common interest — Trade union — Slander on officer as such—Action by officer—Indemnity by union against costs—Ultra vires – – – – – – **98**
See MAINTENANCE OF SUIT.

SOLICITATION—Goodwill—Assignor — Deed of assignment for benefit of creditors—Compulsory alienation—Sale of business and goodwill by trustee—Solicitation of old customers by assignor – **562**
See GOODWILL.

SOLICITOR—*Profession—Admission of Women —Disqualification—Inveterate Usage—Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 48.

Before the passing of the Solicitors Act, 1843, women were by the common law of England under a general disability, by reason of their sex, to become attorneys or solicitors. That disability can be, and is, proved by inveterate usage. It could not be removed by a mere interpretation clause, such as the Solicitors Act, 1843, s. 48, which provides that words importing the masculine gender shall extend to a female. There is nothing in the Solicitors Act, 1843, or any amending statute which can be construed as giving women any new right to become solicitors. The disability therefore continues, and the Law Society cannot admit any woman to their preliminary examination with a view to her becoming a solicitor.

Decision of Joyce J. affirmed. BEBB *v.* LAW SOCIETY – – – – – **C. A. 286**

SOLICITOR —*continued.*

—— Contract—Memorandum in writing—Signature by agent " lawfully authorized "—Sale of land — Part performance — Statute of Frauds – – – **788**
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—— Costs—Company—Winding-up — Taxation of costs—Costs incurred before winding-up—Taxation in winding-up or under the Solicitors Act, 1843 – – **492**
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—— Lunacy—Lunatic not so found by inquisition — Receiver — Quasi-committee — Costs—Delay in payment—Statute of Limitations—Application by solicitor
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——Lunatic—Action by lunatic not so found—Lunacy not admitted by defence—Relevant issue at trial—Authority of solicitors of plaintiff to bring action—Costs – – – – – **968**
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29 Car. 2, c. 3, s. 4—*Statute of Frauds* – **788**
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1829.

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1833.

3 & 4 Will. 4, c. 27, s. 9—*Real Property Limitation* – – – – – **438**
See DEED.

3 & 4 Will. 4, c. 74, s. 15—*Fines and Recoveries*
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1843.

6 & 7 Vict. c. 73—*Solicitors* – – – **492**
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8 & 9 Vict. c. 16, ss. 14—17, 81, 85, 89, 90, 92, 99—*Companies Clauses Consolidation* – **568**
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1854.

17 & 18 Vict. c. 113, s. 1—*Locke King's Act—Real Estate Charges* – – – 278
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1855.

18 & 19 Vict. c. 128, s. 9—*Burial* – – 808
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1856.

19 & 20 Vict. c. 47, ss. 5, 61—*Joint Stock Companies* – – – – – 527
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25 & 26 Vict. c. 89, ss. 8, 38—*Companies* – 527
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—— —— s. 49 – – – – – – 883
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1867.

30 & 31 Vict. c. 69, s. 1—*Locke King's Act—Real Estate Charges* – – – 278
See WILL. 7.

30 & 31 Vict. c. 133—*Consecration of Churchyards* – – – – – 808
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1875.

38 & 39 Vict. c. 55, ss. 150, 257—*Public Health*
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1881.

44 & 45 Vict. c. 41, s. 7, sub-s. 1 (A)—*Conveyancing and Law of Property* – 68
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45 & 46 Vict. c. 38, s. 2, sub-ss. 1, 5, 8; s. 38—*Settled Land* – – – – 110
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62 & 63 Vict. c. cclxvi., s. 61—*London County Council (Improvements)* – – 125
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5 Edw. 7, c. 15, s. 9, par. 5; ss. 12, 39—*Trade Marks* – – – – – 856
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6 Edw. 7, c. 41, s. 60—*Marine Insurance* – 453
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6 Edw. 7, c. 48, s. 52, sub-s. 1—*Merchant Shipping* – – – – – – 453
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6 Edw. 7, c. 55, ss. 2, 4—*Public Trustee* – 83
See CHARITY. 2.

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8 Edw. 7, c. 69, ss. 3, 123—*Companies (Consolidation)* – – – – – 527
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—— —— s. 68 – – – – – 382
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—— —— s. 174 – – – – – 775
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9 Edw. 7, c. 49, ss. 2, 3, 29, 30, 31, 32—*Assurance Companies* – – – 724
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—— Will—Construction—Life tenant—Power to apply corpus for his own benefit—Appointment by deed poll—Absolute interest - - - - - 865
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TIME—Covenant—Not to underlet without consent—Withholding consent—Underlease without consent - - - - 782
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TITLE—Settled land—Power of appointment—Sale—Compound settlement—Trustees for the purposes of the Settled Land Acts
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TRADE—Restraint of.
See under RESTRAINT OF TRADE.

TRADE MARK—*Registration—Special Application—Registrable Mark—Distinctive Mark—Adapted to distinguish—Application to register Two blue Lines with Red Line between—Imposition of Conditions of User—Jurisdiction of Court—Form of Order—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* 5; *ss.* 12, 39.

The applicants applied under s. 9, par. 5, of the Trade Marks Act, 1905, to register as a trade mark for canvas woven fire-hose in class 50 two blue lines with a red line between. They had for twenty years at least made hose marked with these lines which were woven throughout the whole length of the fabric. The evidence shewed that hose so marked was well known and identified as being of the applicants' manufacture. The registrar refused to proceed with the application on the grounds (1.) that a coloured line woven into hose was not a registrable trade mark and (2.) that the mark was not distinctive. The applicants appealed to the Board of Trade, who referred the matter to the Court:—

Held, that the three lines of colour as appearing in the representation on the application form were not "adapted to distinguish" the goods of the applicants from those of other persons, but that if registered subject to a condition that no protection should be given to the mark except when used throughout the whole length of the fabric and substantially of the width shewn on the application form, the mark so defined would be adapted to distinguish.

Held, also, that under s. 12 read with s. 39 of the Act it was competent to the registrar to accept and for the Court to direct him to accept the mark of the applicants subject to such a condition. *In re* APPLICATION OF F. REDDAWAY & CO., LIMITED
Warrington J. 856

TRADE UNION—Maintenance of suit—Common interest—Slander on officer as such—Action by officer—Indemnity by union against costs—Ultra vires - - 98
See MAINTENANCE OF SUIT.

TRUST.
See under TRUSTEE.

—— Will — Construction — Gift in trust for Franciscan Friars — Validity — Roman Catholic Relief Act, 1829 - - 937
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TRUSTEE — *Breach of Trust — Relief from Liability—Statute of Limitations—Trustee Act,* 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8—*Judicial Trustees Act,* 1896 (59 *&* 60 *Vict. c.* 35), *s.* 3.

A testatrix who died in 1887 bequeathed her residuary personal estate to trustees upon trust to pay the income in equal third parts to her two nephews and her niece during their respective lives and subject thereto to hold the capital and income of the whole in trust for the children of her said nephews and niece who might be living at the time of the failure of the trust thereinbefore contained. Upon the death in 1896 of one of the nephews leaving a widow and children, the trustees, acting upon the erroneous advice of their solicitor as to the effect of the will, paid the income of the deceased nephew's share to his widow for the maintenance of his children. In 1910 it was declared by the Court that the period of distribution was at the death of the survivor of the testatrix's nephews and niece, that there was an implied trust for accumulation of the income until the period of distribution, but that under the Thellusson Act that trust came to an end in 1908, twenty-one years from the death of the testatrix.

In an action by the testatrix's sole next of kin to recover from the trustees the income of the deceased nephew's share as from 1908, and the interest arising from accumulations of income which ought to have been made between 1896 and 1908, the defendants pleaded the Statute of Limitations, relying upon s. 8 of the Trustee Act, 1888, and also claimed relief under the Judicial Trustees Act, 1896:—

Held by the Court of Appeal, affirming the decision of Warrington J., that the case fell within s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, as being one where no existing statute of limitations applied, and by virtue of the proviso at the end of par. (*b*) time did not begin to run against the plaintiff until 1908, when her interest fell into possession, so that the statute was no bar to her claim.

Semble, that the proviso applied to par. (*a*) as well as to par. (*b*) of sub-s. 1.

Held, further, reversing the decision of Warrington J., that the application of s. 3 of the Judicial Trustees Act, 1896, is not confined to cases where the breach of trust arises from some executive or administrative blunder, but may extend to cases where money is paid to a person not entitled according to the true construction of the instrument; that in this case the trustees could not be said to have acted "unreasonably" merely because they had, under legal advice, taken a wrong view of the construction of the will, and, there being no question as to their having acted "honestly," they "ought fairly to be excused for the breach of trust," and were entitled, under s. 3, to be relieved from personal liability for the same.

Observations of Kekewich J. in *Davis* v. *Hutchings* [1907] 1 Ch. 356, 365, disapproved. *In re* ALLSOP. WHITTAKER *v.* BAMFORD **C. A. 1**

2. —— *Investments—Trustee and Cestuis que Trust—Inquiry as to Continuing Investments—Discretion of Trustees—Interference by Court on Originating Summons—Rules of the Supreme Court,* 1883, *Order LV., rr.* 3, 4, 12.

On an originating summons taken out under Order LV., r. 3, by a beneficiary under a settlement the Court will in a proper case direct an inquiry whether it is for the benefit of the persons interested that a particular authorized investment should be continued or called in, notwithstanding that the trustees claim to exercise their own discretion in the matter without the interference of the Court.

Observations on the propriety of the investment of trust funds on the security of an underlease. *In re* D'EPINOIX'S SETTLEMENT. D'EPINOIX *v.* FETTES **Warrington J. 890**

3. —— *Mortgage Security — Interest duly paid—No Suspicion of Jeopardy — Mortgage properly retained — Distribution of Estate in Specie—No Valuation of Mortgage—Appropriation of Mortgage to Settled Share—Mortgage in Fact worthless at Date of Appropriation — Liability of Trustee — Judicial Trustees Act,* 1896 (59 *&* 60 *Vict. c.* 35), *s.* 3.

While the interest on a trust mortgage was being regularly paid, and before anything had occurred to suggest that the security was in jeopardy and not properly retainable by the trustee, the trustee distributed the estate, and, without inspecting the mortgaged premises, which were ten miles off, or making any inquiry as to their actual value as a security, appropriated the mortgage at par to a settled share.

At the time of this appropriation the premises were in fact derelict, unoccupied, and in a dilapidated condition, and practically worthless as a security, though the mortgagor still continued to pay the interest regularly; and when about two years later the mortgage was called in the money was found to be irrecoverable:—

Held, that in the circumstances the appropriation was a breach of trust, and that the trustee was not entitled to relief under the Judicial Trustees Act, 1896, s. 3.

Rawsthorne v. *Rowley* [1909] 1 Ch. 409, n., distinguished. *In re* BROOKES. BROOKES *v.* TAYLOR – – – – **Astbury J. 558**

N.B.—See also *In re Lepine* [1892] 1 Ch. 210, 218.

—— Company — Debentures — Trust deed — Remuneration of trustees — Appointment of receiver—Extent of right to remuneration – – – – **687**
See COMPANY. 7.

—— Custodian trustee — Public Trustee Act, 1906, ss. 2, 4 – – – – **83**
See CHARITY. 2.

—— Executor—Devastavit—Statute of Limitations — Trustee Act, 1888 — Liability under covenants in lease – – **233**
See ADMINISTRATION. 1.

TRUSTEE—*continued.*

—— Power of appointment — Title — Sale — Compound settlement—Trustees for the purposes of the Settled Land Acts **110**
See SETTLEMENT. 4.

—— Settled land.
See under SETTLED LAND.

—— Will — Construction — Charitable trust — Trustees to expend residue "as they know to be most in agreement with my desires" — Parol evidence—Sufficiency —Secret trust—Communication to one of two trustees—Trustee a beneficiary
See WILL. 4. **662**

—— Will—Residue—Trust for sale and conversion— Power to postpone — Shares in limited company—Discretion of trustees
See WILL. 15. **192**

—— Will—Trust for sale—Power to postpone—Settlement of residuary estate — Share vested in possession — Right of beneficiary to insist on immediate sale **62**
See WILL. 4.

ULTRA VIRES — Company — Auditors—Duties — Legal knowledge — Balance-sheet — Ultra vires payments - - **139**
See INTERNATIONAL LAW.

—— Maintenance of suit — Common interest—Trade union—Slander on officer as such —Action by officer — Indemnity by union against costs - - - **98**
See MAINTENANCE OF SUIT.

UNDERLET—Covenant—Not to underlet without consent — Withholding consent—Time—Underlease without consent **782**
See LANDLORD AND TENANT. 1.

VENDOR AND PURCHASER—*Contracts negativing Compensation — Conveyance — Parcels—Plans — Falsa demonstratio —Implied Covenants for Title—Omission to prevent Acquisition of Title under Statute of Limitations—Liability of Vendor — Measure of Damages — Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (A).

Description of property as B. H. Farm in the occupation of certain named tenants, with correct measurements added.

Held (reversing the decision of Sargant J. [1913] 2 Ch. 39), on the true construction of the conveyance, to be an accurate description of the land sold and not vitiated by a reference to a plan which included other land. EASTWOOD *v.* ASHTON - - - **C. A. 68**

2. —— *Contract for Sale of Land—Restrictive Stipulation for Benefit of Adjoining Lands of Vendor—Adjoining Lands sold before Completion of Contract—Whether Restrictive Covenant enforceable.*

In December, 1898, the owner in fee of an hotel agreed to sell it to H., the predecessor in title of the plaintiffs. The contract provided that the conveyance should contain a covenant by H., her heirs and assigns, restrictive of the user of the hotel for the benefit of adjoining houses and lands of which the vendor was owner in fee but under a different title. It was a residential neighbourhood, but the contract was no part of a building scheme. The purchase was completed in December, 1899, and the conveyance contained a covenant by H. in the terms of the restrictive stipulation.

Between the date of H.'s contract and the date of completion all the vendor's houses and lands adjoining the hotel were put up for sale by public auction in lots subject to conditions of sale which made no reference to H.'s contract or to the restrictive stipulation. All the lots were sold and conveyed to various purchasers before December, 1899.

In December, 1912, the plaintiffs sold the hotel to the defendant free from restrictions, knowing that he proposed to erect a music hall on part of the hotel premises. The defendant refused to complete on the ground that the hotel was bound by the restrictive stipulation in H.'s contract and conveyance, and that the erection of a music hall might be a breach of the covenant. In an action for specific performance :—

Held, that the material date was not the date of the agreement of December, 1898, but the date of the conveyance of December, 1899 ; and that, as the vendor at that date had no property to which the benefit of the restrictive covenant could attach, the hotel was not subject to any restrictive stipulation. MILLBOURN *v.* LYONS **Neville J. 34**

3. —— *Improvement Charge—By whom to be borne—London County Council (Improvements) Act*, 1899 (62 *&* 63 *Vict. c. cclxvi.*), *s.* 61.

An improvement rent-charge imposed on land within the improvement area under the London County Council (Improvements) Act, 1899, s. 61, is not an effective charge on the land until after a resolution of the council approving the assessment notwithstanding that the improvement itself has been completed at an earlier date. If, therefore, the land is contracted to be sold free from incumbrances after the completion of the improvement but before the date of such resolution, the purchaser is not entitled to a conveyance of the land free from the improvement rent-charge.

Stock v. *Meakin* [1900] 1 Ch. 683, distinguished. *In re* FARRER AND GILBERT'S CONTRACT - - - - - **Sargant J. 125**

—— Company.
See under COMPANY.

—— Goodwill.
See under GOODWILL.

WAIVER—Diplomatic agent—Privilege—Diplomatic Privileges Act, 1708 - - **139**
See INTERNATIONAL LAW.

WALL—Demise of room—Right to outside wall —Evidence - - - - **213**
See LANDLORD AND TENANT. 2.

WAY, RIGHT OF—*Easement—Private Road—Right of Entry of Owner of Dominant Tenement—Obstruction by Gates—Damages in lieu of Injunction—Payment into Court with Denial of Liability—Costs—Rules of the Supreme Court,* 1883, *Order* XXII., *r.* 6.

Where a right of way over land laid out as a roadway is granted or reserved to the owner of adjoining land as appurtenant thereto and to every part thereof, he may pass from his land to the roadway at any point which he may from time to time desire, and may for that purpose remove any part of his fence.

Where, prima facie, an unrestricted right of way over one person's land has been granted or reserved to another person and there is no bargain that the owner of the servient tenement shall be entitled to place a gate across the entrance of the roadway, nor any surrounding circumstances from which the inference that there was such a bargain can be drawn, so placing a gate is an obstruction of the way giving the owner of the easement a right of action.

The ratio decidendi of *James* v. *Hayward* (1630) W. Jo. 221 followed.

Andrews v. *Paradise* (1725) 8 Mod. 318 explained.

The defendant granted to the plaintiff a piece of land to the extreme south of the bulk of his own land, and an adjoining piece of land (coloured blue on a plan) to the north of the land so granted, reserving to himself, his heirs and assigns, owner or owners of a messuage and land adjoining the blue land on the north, and his and their tenants and servants, and all other persons authorized in that behalf by him and them, from time to time and at all times and for all purposes, to pass and repass, with or without animals, carts, and carriages, over and along a road ten feet wide covenanted to be made by the plaintiff on the blue land; and the plaintiff by the same deed, as beneficial owner, granted to the defendant in fee simple the same right of way "as appurtenant to the same land and every part thereof." The plaintiff made the ten-foot road on the blue land, the defendant's fence along the middle of it being moved back to the boundary of his own land on the north. The defendant built shops on his land and at the south-east corner thereof removed his fence for some sixteen feet along the roadway, so placing his shop frontage at this point that he left a triangular piece of his own land vacant, and bounded on one side by the frontage, on another by a public highway, and on the third side by sixteen feet of the private road. The plaintiff then put a railing along this sixteen feet and erected a gate across the eastern entrance from the highway to the private road. The defendant promptly removed both railing and gateway:—

Held, that the defendant was justified by the terms of the grant of his right of way in removing the rail and gate.

The defendant had erected on his land a pilaster which, at a height of some twelve feet above the private road, projected about twenty inches over. The plaintiff asked for a mandatory injunction for the removal of the pilaster, but the defendant, while denying liability, paid 5*l.* into Court, and pleaded that that was enough to satisfy the plaintiff's claim in respect of the projection:—

Held, that damages should be awarded in lieu of a mandatory injunction, and that, as damages to the amount of more than 5*l.* had not been shewn and the judge was not satisfied that there were reasonable grounds for not accepting the sum paid in, the plaintiff must, under Rules of the Supreme Court, 1883, Order XXII., r. 6, pay the costs of the issue as to liability in respect of the pilaster. PETTEY *v.* PARSONS – – **Sargant J. 704**

WIDOW—Settlement—Real property—Limitation to widow of bachelor for life with remainder to issue—Definition of rule restraining limitations to unborn issue *See* SETTLEMENT. 3. **595**

WIFE—Husband and.
See under HUSBAND AND WIFE.

WILL—*Advances by Parent to Children—Release by Will—Residue bequeathed to Widow for Life and then to Children—Direction to bring Advances by Way of Loan into Account on Division—Will—Construction.*

A testator had made advances by way of loan to each of his sons on the understanding that they were to carry interest, but that the testator would not enforce payment, and that if unpaid the advances were ultimately to be brought into account in the division of the testator's estate. The testator never required any repayment, but parts of the sums were repaid spontaneously. By his will the testator gave his residuary estate to his wife upon trust to receive the income and apply the same for her own use for life, and after her decease he gave the residue to trustees upon trust to divide the same among such of his children who should then be alive, the issue of any deceased child to take his or her parent's share. The will, as altered by two codicils, contained a proviso that if a son should at the death of the testator's wife be an undischarged bankrupt his share should be held in trust for his wife, and a direction that in making such division any advances made to any son during the testator's lifetime which had not been repaid should be brought into account by him with interest at 2 per cent. from the date of the advance to the date of the testator's wife's death:—

Held, that the sons were not released from the obligations which they were under as debtors to repay the advances made by the testator, and that the testator's widow was entitled during her life to the interest on the amount of the advances.

Decision of Sargant J. [1914] 1 Ch. 581 affirmed. *In re* YOUNG. YOUNG *v.* YOUNG **C. A. 976**

2. —— *Ambiguity—Latent Ambiguity—Gift to Husband and Wife and "their daughter"—Five Daughters—Extrinsic Evidence as to which Daughter was meant—Division into Three Shares.*

Testatrix gave her residuary personal estate "between my brother W. J. his wife and

WILL—*continued.*

their daughter.” She died in 1913, leaving her surviving W. J. his wife, and five daughters of W. J. and his wife, of whom Phœbe was one. W. J. and his wife were married in 1873.

Evidence was adduced to the effect that the testatrix was on extremely intimate terms with Phœbe alone, and that by a former revoked will made in 1909 the testatrix gave her residue to be equally divided between her brother W. J. and “his daughter Phœbe”:—

Held, that evidence of intention was admissible for the purpose of shewing which of the five daughters was intended, but that treating the evidence as evidence of surrounding circumstances only it was sufficient to shew that Phœbe was the daughter referred to by the testatrix.

Held, also, that on the true construction of the will the residue was divisible in equal third shares, W. J. and his wife taking separately and not as one person.

In re Dixon (1889) 42 Ch. D. 306 followed.

In re Jupp (1888) 39 Ch. D. 148 discussed. *In re* JEFFERY. NUSSEY *v.* JEFFERY

Warrington J. 375

3. —— *Bequest to Unmarried Daughters of A. and B.—Bequest to B. personally—Division per capita—Construction of Will.*

Testatrix, after giving certain pecuniary legacies, including a legacy of 500*l.* to Dr. G. in recognition of his kindnesses, gave her residuary estate in trust to pay the income to her sister during her life, and after her death in trust to divide the same into two equal moieties, one moiety to be paid to the testatrix’s niece, and “the other moiety to be divided equally between the unmarried daughters of my brother-in-law Dr. H. and Dr. G. equally.” At the date of the will the testatrix’s sister was seventy-four years of age; Dr. H. had five daughters, of whom three were unmarried, and Dr. G. had one daughter only who was four years of age:—

Held, that looking to the surrounding circumstances, on the true construction of the will the gift was a gift to Dr. G. personally and not to his unmarried daughter.

Held, also, that the moiety was divisible in equal fourth shares between the three unmarried daughters of Dr. H. and Dr. G.

In re Walbran [1906] 1 Ch. 64 followed on the first point and distinguished on the second point. *In re* HARPER. PLOWMAN *v.* HARPER

Sargant J. 70

4. —— *Charitable Trust — “Residence for ladies of limited means”—Trustees to expend Residue “as they know to be most in agreement with my desires”—Parol Evidence—Sufficiency—Secret Trust—Communication to one of two Trustees — Trustee a Beneficiary — Will — Construction.*

By her will, made in March, 1900, a testatrix, who died in 1911, devised and bequeathed her real and personal estate to the plaintiffs, Dr. Le P. and his daughter W. Le P., upon trust to sell and convert into money such portions as should be necessary upon trust for the maintenance of a temporary house of residence for ladies of limited means; if, at any time, such house should be considered unnecessary the money thus set apart was to be distributed by the trustees in yearly payments to such ladies as they might consider worthy of such assistance. The testatrix then appointed Dr. Le P. and W. Le P. executors of her will, and directed that they should “expend all or any of the residue of my estate in such manner as they know to be most in agreement with my desires.”

WILL—*continued.*

By a codicil made in 1903 the testatrix confirmed her will.

It was proved by the evidence of Dr. Le P. that in 1886 the testatrix had told him that she intended to provide for his three children; that on various occasions she said she would make her will and leave all to them; and that in March, 1900, she handed him a duplicate of her will, asking him to keep it, saying “I have told you many times I was going to make my will, and that I would leave all to your dear girls.”

This last statement was made to Dr. Le P. before or contemporaneously with the execution of the will, and he accepted the trust, but the statements as to the intentions of the testatrix were not made to W. Le P. prior to the date of the will.

On a summons taken out by the trustees, to which the Attorney-General and the next of kin of the testatrix and the two other daughters of Dr. Le P. were respondents:—

Held by Eve J.: (i.) That the primary trust in the will was a good charitable trust of so much of the estate as might be necessary for the maintenance of the house, and the subsequent alternative bequests did not render it void for uncertainty.

(ii.) That inasmuch as the trust as to the residue appeared on the face of the will, parol evidence was admissible to prove the particular manner in which the testatrix desired the residue to be disposed of; that she had communicated her determination to the plaintiffs at or before the making of the will; and that the plaintiffs had accepted the trust.

(iii.) That, on the evidence, the communications to Dr. Le P. were sufficient to impress the estate with a trust in favour of his three daughters, and there was no necessity for the communication of the trust to be made to and accepted by both the trustees.

Held, therefore, that the ultimate residue was to be held by the trustees upon trust for the three daughters of Dr. Le P., and not for the next of kin of the testatrix.

Held by the Court of Appeal (reversing the decision of Eve J. on this point), that the plaintiffs had failed to establish by their evidence the existence of the trust. *In re* GARDOM. LE PAGE *v.* ATTORNEY-GENERAL - **C. A. 662**

5. —— *Children — Gift to “Children” — Illegitimate Children—Belief of Testatrix in their Legitimacy — Exclusion — Will — Construction.*

A testatrix by her will dated in 1911 gave the residue of her property in trust for her brother F. during his life, and after his death in trust for "all or any the children or child of" F. living at the death of the survivor of the testatrix and F., "and the children or child then living of any deceased child of his who, whether children or grandchildren, being male attain the age of twenty-one years or being female attain that age or marry."

At the dates of the will and the testatrix's death respectively F. had six illegitimate children living (who had been born to him by K., to whom he was reputed to be married, and who died in 1900), and two legitimate children by his marriage in 1904 with S. K. was throughout supposed to be and was accepted as F.'s wife in the society in which they moved; her six children were received as legitimate children; and the testator knew them all and was fond of some of them, and had been informed by F. in response to an application by her for a list of his children prior to making her will that they were the children of his first wife:—

Held, that the only exceptions to the general rule that "children" prima facie meant legitimate children were those stated by Lord Cairns in *Hill* v. *Crook* (1873) L. R. 6 H. L. 265, 282, 283, and *Dorin* v. *Dorin* (1875) L. R. 7 H. L. 568, and that the fact that the testatrix in the present case was informed and believed that the six children of F. were legitimate did not constitute a further exception to that rule.

Held, therefore, that only the two legitimate children took under the gift.

In re Brown (1890) 63 L. T. 159 approved.

In re Du Bochet [1901] 2 Ch. 441 overruled.

Decision of Sargant J. [1913] 2 Ch. 674 affirmed. *In re* PEARCE. ALLIANCE ASSURANCE COMPANY, LIMITED *v.* FRANCIS **C. A. 254**

6. —— *Conversion—Trust for Conversion—Power to postpone—Shares in Residue—Advances in Lifetime of Testator—Subsequent Advances by Trustees — Hotchpot — Difficulty of realizing Estate—Principle of ascertaining Income pending Distribution—Appropriation in Specie—Unauthorized Investments — Settled Shares — Jurisdiction of Court—Will—Construction.*

Testator by his will devised and bequeathed his residuary real and personal estate to three trustees, two of whom were his sons, upon trust to sell and convert and to stand possessed of the proceeds upon trust for all his children, except his son J. A., in equal shares, and he directed that all properties and investments acquired by him in the names of any of his children or advances to or for the benefit of his children should be treated as absolute gifts to such children of the properties, investments, and advances which might be taken in their names individually or given to or for their benefit, and that such children should not be liable to repay to him or his estate the consideration which he had paid for the properties or the amounts that might have been advanced or invested on such securities or otherwise. He further directed that in the division of his estate his trustees should equalize his children's shares as far as possible by treating all gifts to them as having been made in satisfaction or part satisfaction of their shares. The testator then settled the shares of his daughters, and declared that his trustees might postpone the sale and conversion of his real and personal estate for so long as they should think fit, the income of the unconverted property to go to the persons to whom the income produced by the sale and conversion would for the time being be payable if the sale and conversion had been actually made. The investment clause did not authorize the investment in the shares of private companies. The testator died in December, 1892, leaving six children other than J. A., who took no interest in the residue, namely, two sons and four daughters. A considerable part of the testator's estate consisted of shares in a private company called Cravens Limited, the articles of which contained restrictive provisions with reference to the transfer of shares. There was no market for these shares, and the trustees, although they had advertised, had been unable to obtain an offer for them. During his lifetime the testator had made advances to certain of his children, and subsequently to his death the trustees had made further advances to two of his sons. The trustees had, for the purpose of dividing the income, pending the distribution of the estate, added to the income of the actual estate interest at 4 per cent. per annum on the advances to the children, and had then divided the total thus ascertained into six equal shares, and had paid one of such shares to each of the children, deducting in the case of an advanced child 4 per cent. on the amount of the advances to that child:—

Held, that having regard to the difficulty of realizing the Craven shares the principle adopted by the trustees with regard to the advances made both before and after the death of the testator was the correct one.

In re Poyser [1908] 1 Ch. 828 followed.

In re Hargreaves (1903) 88 L. T. 100 explained and distinguished.

Held, also, that the power to postpone conversion applied to the Craven shares only so long as the estate was retained by the trustees as a whole, and did not extend to authorize them to appropriate those shares to the settled shares of the daughters when the estate was divided.

In re Beverly [1901] 1 Ch. 681, 688 followed.

In re Brooks (1897) 76 L. T. 771 and *Fraser* v. *Murdoch* (1881) 6 App. Cas. 855 distinguished. *In re* CRAVEN. WATSON *v.* CRAVEN – – – **Warrington J. 358**

7. —— *Debts—General Charge of Debts (including Mortgage Debts)—Specific Devises of Incumbered and Unincumbered Realty—Later Clause devising particular Property on Trust for Payment of Debts—Exoneration—Locke King's*

WILL—*continued.*

Acts—Real Estate Charges Act, 1854 (17 *&* 18 *Vict. c.* 113), *s.* 1—*Real Estate Charges Act*, 1867 (30 *&* 31 *Vict. c.* 69), *s.* 1.

A testator commenced his will by saying "First I will that all my just debts (including mortgage debts) and funeral and testamentary expenses be paid and satisfied." He then gave a specific bequest of personalty to his son T., and six separate specific devises of realty to that son and his other children. Finally he devised other real estate and the residue of his personalty upon trust for conversion, and out of the proceeds to pay his just debts (including mortgage debts) and funeral and testamentary expenses, and to hold the balance for his sons and daughters equally. The values of the properties were as follows: Specific bequest to T., 1671*l.*; real estate specifically devised to the children, 17,110*l.*; personalty subject to final trust, 330*l.*; realty subject to that trust, 1170*l.* Part of the realty specifically devised was unincumbered; other parts were subject to various mortgages amounting to 7000*l.* The other, unsecured, debts amounted to 970*l.* It was conceded that the funds subject to the final trust, so far as they would extend, must be applied in payment, rateably, of the mortgage debts and the other debts and funeral and testamentary expenses:—

Held, (1.) following *Thomas* v. *Britnell* (1751) 2 Ves. Sen. 313; *Palmer* v. *Graves* (1837) 1 Keen, 545; and *Corser* v. *Cartwright* (1873) L. R. 8 Ch. 971, that the implied charge of debts created by the initial direction was explained and limited by the final creation of a definite fund for the purpose, and that no other part of the real estate than that comprised in it was charged with debts and funeral and testamentary expenses; (2.) that the proportion of mortgage debts not discharged out of the special trust fund must be borne by the various mortgaged properties, each bearing the balance of its own incumbrance; and (3.) that the proportion of the other debts and expenses not discharged out of the special fund must, as between the personalty specifically bequeathed to T. and the various specifically devised real estates, fall rateably on them in proportion to their values, which in the case of those which were incumbered would be the total value of each property less the proportion of mortgages on it not discharged out of the special fund. *In re* MAJOR. TAYLOR *v.* MAJOR **Sargant J. 278**

8. —— "*Domestic Servant*" — *Meaning of* "*domestic*"—*Male Nurse—Temporary Suspension of Service—Will—Legacy.*

By his will a testator, who died in April, 1912, bequeathed to each of his "domestic servants" who should have been in his service for two years prior to his decease the amount of one year's wages, free of duty. One of the claimants for this legacy was B., a certified male nurse and masseur, who was first engaged in 1907 by the receiver in lunacy of the testator's estate as an assistant attendant on the testator, at a weekly wage of a guinea. He did not sleep in the house, but took some of his meals there. From November, 1910, till the testator's death, with one break, he was engaged on night duty, twelve hours at a time, and at a salary of two guineas a week paid every fourth week. Owing to the strain of this attendance B. was obliged to take a holiday of four months in 1911 with the consent of the receiver, and received no salary during his absence. During his attendance he was free to undertake other work, and did so to a limited extent. On a summons by the executors of the testator to determine the question whether B. was entitled to the legacy:—

Held that, on the true construction of the will B. was a domestic servant, the term "domestic" being equivalent to "household."

Held, also, that although the service must be continuous for the period named, that did not involve service from day to day, and the suspension of the service, with the consent of the master, did not disentitle B. to the legacy claimed. *In re* LAWSON. WARDLEY *v.* BRINGLOE – – – – **Eve J. 682**

9. —— *Gap in Provisions—Capital of Shares not disposed of—Supplying Omission by Implication—*"*Survivors or Survivor*"*—Will—Construction.*

Testator bequeathed personal estate on trust for conversion and to pay the income to his three daughters equally for life, and after the decease of any of them leaving issue to pay a third part of the capital of the trust fund to her children, and in the event of any of his daughters dying without leaving issue the survivors or survivor were to take her share of the income for life, and in case all his daughters should die without leaving issue the capital of the trust fund was to be divided among his next of kin. Two daughters died, one leaving children. On the third dying subsequently without issue:—

Held, that there was an intestacy as to two thirds of the capital. *In re* MEARS. PARKER *v.* MEARS – – – – **Eve J. 694**

10. —— *Gift in Trust for Franciscan Friars —Validity — Will — Construction — Roman Catholic Relief Act*, 1829 (10 *Geo.* 4, *c.* 7), *ss.* 28 *to* 37.

Gift of residue in trust for "the society or institution known as the Franciscan Friars of Clevedon in the county of Somerset absolutely,"

Held, an absolute immediate gift to the individual friars composing the society or institution at the testator's death, and valid.

The provisions of the Roman Catholic Relief Act, 1829, which are directed to the suppression and prohibition of religious orders, or members thereof, of the Church of Rome, bound by monastic or religious vows, do not operate so as to render void an absolute immediate bequest to individuals ascertained at the death of the testator.

Cocks v. *Manners* (1871) L. R. 12 Eq. 574 followed.

Series of Irish cases—*Sims* v. *Quinlan*

WILL *continued.*

(1865) 17 Ir. Ch. Rep. 43; *Walsh* v. *Walsh* (1869) I. R. 4 Eq. 396; *Kehoe* v. *Wilson* (1880) 7 L. R. Ir. 10; *Liston* v. *Keegan* (1882) 9 L. R. Ir. 531; *Morrow* v. *M'Conville* (1883) 11 L. R. Ir. 236; *Murphy* v. *Cheevers* (1885) 17 L. R. Ir. 205; *Burke* v. *Power* [1905] 1 I. R. 119; *MacLaughlin* v. *Campbell* [1906] 1 I. R. 588; *Cussen* v. *Hynes* [1906] 1 I. R. 539—considered. *In re* SMITH. JOHNSON *v.* BRIGHT-SMITH — **Joyce J. 937**

11. —— *Life Tenant—Power to apply Corpus for his own Benefit—Appointment by Deed Poll—Absolute Interest—Will—Construction.*

Testatrix appointed her husband and another person (who disclaimed) her executors and trustees, and gave her real and personal estate to her trustees upon trust for sale and conversion and investment of the proceeds, and to stand possessed thereof upon trust as to one third of the income to pay the same to her mother (who predeceased the testatrix) during her life, and after her death to pay the same to her husband until he should marry again or die, and as to the remaining two thirds of the income upon trust to pay the same to her husband until he should marry again or die, and she thereby authorized her husband so long as he was entitled to the income of part or of the whole of her estate to apply such portion of the corpus of her estate as he should think fit for his own use and benefit, and subject as aforesaid gave her estate for certain charitable purposes.

The testatrix died in 1910. Her husband did not marry again, and died having by a deed poll appointed the corpus of the testatrix's estate to himself for his own absolute use and benefit:—

Held, that on the true construction of the testatrix's will the husband had power in his lifetime to appoint the corpus of the whole estate to himself absolutely, and that he became absolutely entitled under the joint effect of the will and deed poll.

In re Richards [1902] 1 Ch. 76 followed.

Dictum of James L.J. in *In re Thomson's Estate* (1880) 14 Ch. D. 263, 264 considered. *In re* RYDER. BURTON *v.* KEARSLEY **Warrington J. 865**

12. —— *Mines—Tenant for Life and Remainderman—Will directing Sale of Real Estate—Power to postpone—Direction as to Payment of Rents and Profits till Sale—Rents and Royalties under Mining Leases—Open Mines.*

Testator gave his real and personal estate to a trustee upon trusts for sale and conversion and investment of the proceeds of sale, and gave one fourth part of his residuary trust fund in trust to pay the income thereof to A. during his life and after his death upon trusts in favour of his children, and gave another fourth part on similar trusts in favour of B. and her children; and the testator empowered his trustee to postpone the sale and conversion of any part of his real and personal estate for so long as he should think fit, and directed that the "rents, profits and income" of such

WILL—*continued.*

parts of his estate as should remain unsold and unconverted should be paid to the persons to whom the income of the proceeds of such sale and conversion would be payable under his will if such sale and conversion had been actually made.

The testator's estate comprised open mines which were leased to lessees and were still unsold:—

Held, that under the terms of the will A. and B. were respectively entitled to receive the whole of the rents and royalties attributable to their respective shares, no part being retained as capital.

Testator in 1889 granted a lease of part of a mineral area and entered into negotiations with the lessees for a lease of the adjoining part. He died in March, 1912, and the trustee of his will continued the negotiations, and in October, 1912, granted a lease to the same lessees of such adjoining part which was intended to be worked through the shaft sunk on the part comprised in the lease of 1889:—

Held, that the minerals comprised in the lease of October, 1912, must be treated as an open mine at the date of the testator's death.

Chaytor v. *Trotter* (1902) 87 L. T. 33 applied.

In 1883 a lease of minerals was made to lessees who worked them through a shaft sunk on other land. In 1897 the lessees surrendered this lease to the testator owing to the working becoming unprofitable, and the minerals remained unworked till the testator's death in 1912, though the testator had entered into negotiations for continuing or resuming their working. In December, 1912, the trustee of the testator's will granted a new lease of these minerals to new lessees who worked them through a shaft sunk on other land:—

Held, that these minerals must be treated as an open mine at the date of the testator's death. *In re* MORGAN. VACHELL *v.* MORGAN **Sargant J. 910**

13. —— *Nephews, Gift to—Exclusion of Nephews of Husband of Testatrix—Will—Construction.*

A testatrix appointed "my nephews" A. B., R. H. L., and W. H. H. to be the executors and trustees of her will, and gave all her residuary estate to them upon trust for division "between my nephews and nieces living at the date of my decease" and the children then living of her nephews and nieces who had predeceased her.

A. B. was a son of a brother of the testatrix. R. H. L. and W. H. H. were nephews of her first husband:—

Held, that only the testatrix's own nephews and nieces and the children of such of them as had predeceased the testatrix took under the the gift of residue. *In re* GREEN. BATH *v.* CANNON - - - - - - **Sargant J. 134**

14. —— *Residue—Legacy at Twenty-three—Age attained in Lifetime of Testator—Interest, from what Date payable.*

A testator gave his residuary estate upon

WILL—*continued*.

trust, subject to an annuity, to pay 2000*l.* to each of his three sons and 1000*l.* to each of his four daughters on their respectively attaining the age of twenty-three years, and directed the residue of the trust estate to be held upon certain trusts. The testator's eldest son and eldest daughter respectively attained twenty-three in his lifetime :—

Held, that the legacies to the eldest son and eldest daughter respectively became ordinary immediate legacies, and carried interest not from the death of the testator but at the expiration of one year from his death.

Coventry v. *Higgins* (1844) 14 Sim. 30 and *Pickwick* v. *Gibbes* (1839) 1 Beav. 271 questioned. *In re* PALFREEMAN. PUBLIC TRUSTEE *v.* PALFREEMAN – – – **Sargant J. 877**

15. —— *Residue—Trust for Sale and Conversion—Power to postpone—Shares in Limited Company—Appropriation of in respect of Shares in Residue — Voting Power — Right of one Residuary Legatee to Transfer of his Proportion of Appropriated Shares of Company—Discretion of Trustees.*

Testator by his will devised and bequeathed his residuary real and personal estate, which included a large number of shares in a limited company, to trustees upon trust to convert, and he empowered them to postpone the conversion of the whole or any part of his residuary estate during so long as his trustees in their uncontrolled discretion should deem proper, and in particular to retain any shares, stocks, and securities of the company, or any other investments held by him at his death, during any period without being liable for any loss arising thereby. He then divided his estate into certain shares, some of which he settled.

Several of the trustees were directors of the company and had large holdings ; and it was stated that if these shares were all kept together the trustees would have a preponderating influence in the company.

In the events which had happened a son and two grandsons of the testator were absolutely entitled to certain shares of the residuary estate and claimed to have transferred to them their proportion of the shares in the company :—

Held (reversing the decision of Warrington J.), that the company was a public company ; that the trustees had not shown that it was necessary or desirable in the circumstances to retain all the shares ; that the power to postpone was for a reasonable time only ; and that in the absence of special circumstances the right of the absolute owners to have a transfer of their shares ought to prevail over the discretion of the trustees. *In re* MARSHALL. MARSHALL *v.* MARSHALL **C.A. 192**

16. —— *Specific Gift of Foreign Property free of Legacy Duty—"Legacy Duty"—French Mutation Duty—Whether payable by Specific Legatee or Executors.*

Testator, a domiciled Englishman, by his will bequeathed to Lady S. "free of legacy duty" all his pictures, engravings, furniture, busts, silver plate, and "works of art" of every description wheresoever situate, except at his two London houses or except those bequeathed specifically by his will. At his death he was possessed of a number of valuable tapestries which were attached to the walls of his house in Paris, which the Court held, upon the facts, passed to Lady S. under the specific bequest of "works of art." According to French law mutation duty was payable by the legatee on these chattels :—

Held, on the construction of the will, that the expression "legacy duty" was used by the testator in its strict legal sense as meaning the duty imposed by the Legacy Duty Act, 1796, and amending Acts, and not as meaning all duties in the nature of legacy duty, and that it did not therefore include the French mutation duty.

Held, also, that, the mutation duty being a debt due by the legatee, the legatee in order to succeed must show that the will imposed on the executors an obligation of paying a debt of the legatee, and this she had not done.

Held, therefore, that the mutation duty was payable by the legatee.

Peter v. *Stirling* (1878) 10 Ch. D. 279 distinguished. *In re* SCOTT. SCOTT *v.* SCOTT **Warrington J. 847**

17. —— *Trust for Sale—Power to postpone—Settlement of Residuary Estate—Share vested in Possession—Right of Beneficiary to insist on immediate Sale.*

A testator by will devised and bequeathed all his residuary real and personal estate to trustees upon trust for sale and conversion, with power to the trustees in their absolute and uncontrolled discretion to postpone the sale or conversion. The will contained a provision that until sale or conversion the rents, profits, and income arising from such part of the residuary estate as should for the time being remain unsold or unconverted should be paid or applied to the persons to whom and and in the manner in which the dividends, interest, and income arising from the investment of the proceeds of sale of the residuary estate would have been payable or applicable under the trusts declared concerning the same ; and the trustees were to stand possessed of the proceeds of sale of the residuary estate in trust for the testator's children who should attain the age of twenty-one years in equal shares as tenants in common.

The testator left seven children who were under twenty-one years of age ; one of them on attaining twenty-one claimed that he was entitled to be paid his one-seventh share of the residuary estate, or to have his share appropriated to him :—

Held, that he was not so entitled so long as the trustees in the bona fide exercise of their discretion determined to postpone the sale.

In re Horsnaill [1909] 1 Ch. 631 approved.

Decision of Warrington J. affirmed. *In re* KIPPING. KIPPING *v.* KIPPING – **C.A. 62**

WILL—*continued.*

18. —— *Words of Futurity—Gift to Children of Child of Testator who "shall die in my lifetime"—Child dead at Date of Will leaving Children—Will—Construction.*

A testator gave the sum of 250*l.* to two grandchildren, J. and G., children of his son P., and he gave his residuary estate "in trust for all my children living at my decease who, being . . . . sons, shall attain the age of twenty-one years, or, being daughters . . . . shall attain that age or marry, in equal shares . . . . Provided always, that if any child of me shall die in my lifetime leaving . . . . children who shall survive me, and being . . . . sons shall attain the age of twenty-one years, or, being . . . . daughters, shall attain that age or marry, then and in such case the last mentioned . . . . children shall take . . . . equally . . . . the share which . . . . their parent would have taken . . . . if such parent had survived me and attained the age of twenty-one years." P., to the knowledge of the testator, was dead at the date of the will. The other children of the testator and also J. and G. survived him, and some of the children had attained twenty-one at the date of the will:—

Held, that J. and G. on attaining twenty-one or marriage took the share in the residue which P. would have taken if he had survived the testator and attained twenty-one.

Loring v. *Thomas* (1861) 1 Dr. & Sm. 497; *Barraclough* v. *Cooper* [1908] 2 Ch. 121, note; *In re Lambert* [1908] 2 Ch. 117; and *In re Metcalfe* [1909] 1 Ch. 424 followed.

Christopherson v. *Naylor* (1816) 1 Mer. 320; *In re Cope* [1908] 2 Ch. 1; *In re Musther* (1890) 43 Ch. D. 569; and *Ive* v. *King* (1852) 16 Beav. 46 distinguished. *In re* WILLIAMS. METCALF *v.* WILLIAMS

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